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Interstate Commerce Law

Act to Regulate Commerce
Principles of Regulation

PART I

Prepared under the direction of the *Advisory Traffic Council of*
The American Commerce Association

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PREFACE

THE term "Interstate Commerce Law," in its abstract sense, is comprehensive of the several laws which constitute the national system of regulation of common carriers engaged in interstate commerce. There are some twenty of these federal statutes, of which the Act to Regulate Commerce is the parent act. Not all of these acts, however, apply directly to the transportation of interstate commerce, but in one respect or another they each relate to the function of interstate transportation, either as to the medium or agency of intercourse and the processes incidental thereto, or to the persons or instrumentalities employed in connection therewith.

Having formulated a statutory system for regulating common carriers engaging in interstate commerce, the National Government created the Interstate Commerce Commission to administer the details of these regulatory laws. The powers of such an administrative body are necessarily limited to those specifically enumerated in the act of its creation, and while the Interstate Commerce Commission is vested with practically absolute administrative authority over interstate transportation and its agencies, the exercise by Congress of its powers, in endowing the Commission with such authority, is subject to review by the courts as to their constitutional sufficiency.

Thus, in analyzing the requirements and effects of the workings of this system of regulatory statutes, we are confronted with a duality in the legal situation—namely,

the administrative effect given to these laws by the Interstate Commerce Commission and the constructive sanction or disapproval of them, or their parts, by the courts, in review of the legislative powers exercised through the Commission as an administrative agent of Congress.

The purpose of "Interstate Commerce Law," Parts I, II, III and IV, is to explain and simplify both the judicial interpretation of the regulatory laws by the courts and their administration by the Interstate Commerce Commission. Hence, the treatment of "Interstate Commerce Law," which is followed throughout these volumes, is one of amplification; in other words, a working explanation, under a system of correlated subjects, of the manner in which these regulatory laws have been and should be administered and complied with, with such reference to interpretations of the laws by the courts, as is necessary to their full comprehension.

The treatment is illustrative rather than argumentative, and the copious citations of authorities in connection with the subjects and details in the text are for reference purposes, frequently showing, by their number, the extent to which a particular principle or rule has been followed in the administrative labors of the Commission. It is not the intention that these citations should be given analytical or argumentative significance.

In Part I of "Interstate Commerce Law" is contained a review of the historical premises of the exercise of federal control of interstate commerce, the five great epochs of the country's commercial history, the enactment of the original Act to Regulate Commerce molded after similar legislation then existing in Great Britain, the virtual reconstruction of the Act to Regulate Commerce by amendatory and supplemental legislation, and the beginning of the amplification of its judicial and admin-

istrative interpretation and enforcement. The most important step in the amplification of section 1 of the Act is the analysis of its jurisdictional features. The test of status determinative of the jurisdiction of the Act over the many forms of transportation agencies employed in the commercial intercourse of the nation, is here developed in its fullest details.

Part II is devoted to a continuation of the amplification of the several sections of the Act to Regulate Commerce, giving categorical expression to the working details of the administrative application of the Act to railway transportation, rail and water service, and shipping transactions.

In Part III the amplification of the remaining sections of the Act is concluded and a complete detailed interpretative analysis of the workings of the Act and its amendatory and supplemental acts consummated.

In Part IV is embraced a complete description and analysis of the machinery provided for the administration of the Act to Regulate Commerce and its amendatory and supplemental acts; in other words, a functional analysis of the organization, and departmental and divisional operations of the Interstate Commerce Commission, including its rules of practice and procedure, with standardized forms for use therewith.

Comprehensive and accurate recitations of the regulatory laws, rulings of the Interstate Commerce Commission and decisions of the courts, are contained in the respective sections constituting the general context of the four volumes on "Interstate Commerce Law," but, in addition thereto, an appendix containing the full text of laws and other documents supplemental to the general context is appended at the conclusion of Volume IV and to which reference will be found in each of the volumes.

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CHAPTER I.

FEDERAL CONTROL OF INTERSTATE COMMERCE.

- § 1. Historical Premises of the Exercise of Federal Control of Interstate Commerce.
- § 2. The Case of "Gibbons vs. Ogden."
- § 3. The "Granger Cases."

CHAPTER I.

FEDERAL CONTROL OF INTERSTATE COMMERCE.

§ 1. Historical Premises of the Exercise of Federal Control of Interstate Commerce.

The enactment into law of the original Act to Regulate Commerce ⁽¹⁾ in 1887, marked the end of a long period of persistent agitation for the affirmative exercise of the federal authority over *quasi* public corporations⁽²⁾ theretofore in more or less absolute possession and control of the highways and means of carrying on commerce between the several states. It was the culmination of a movement along constitutional lines and established a new epoch in the commercial history of the United States.

The subject of federal control over interstate commerce is opportunely dealt with at this time since the enlargement of the present system of national regulation, to include control of commerce within the states, is being urged by those interests which seek maximum efficiency in the national regulating system comprehensive of equitable uniformity throughout the country.

To fully comprehend the necessity for the exercise of the federal power over commerce between the states, inclusive of the full scope of the federal authority—where its authority is exclusive and, where jointly with the state, its authority is

⁽¹⁾ Commonly termed "The Interstate Commerce Law."

⁽²⁾ Quasi-public corporations are those bodies corporate of private ownership, finance and operation which, under either state or federal franchisement, operate public utilities, such as electric light plants, gas plants, street car systems, railways, etc.

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concurrent over the subject-matter of the regulation—it is essential that a brief survey be made of the commercial development of the country, passing for the moment academic discussion of the extent of the powers inherent in the national government by virtue of its constitutional investiture and the complete or partial exercise of such powers through the enactment of regulatory statutes.

The commercial history of the nation is that of a marvelous development of natural resources and commerce. In this process of development has been involved the evolution and growth of the means of transportation on a scale equally as wonderful. With each succeeding decade the country has surprised the world by its tremendous commercial growth and by the development of prodigious systems of industry and trade.

Since the adoption of the Constitution, five commercial transportation epochs in our industrial history have transpired, and, during that time, the commercial pendulum has swung from the extreme of a commerce almost wholly domestic and local within the individual states, to the opposite extreme of a tremendously increased commerce, as predominantly interstate as the former was locally domestic.

During these periods of commercial growth, the medium of commercial intercourse has passed through successively progressive states of development,—from the horse-drawn vehicle of revolutionary days to the mighty railroad system of the present.

The early commerce, existing at the time of the confederation of the original thirteen states, was not extensive, and the function of transportation then employed consisted of the horse-drawn vehicle, and the small sailing vessels which plied along the coastwise waters and the larger rivers, lakes and harbors of the eastern region. With these

meager means of intercourse, the new nation passed through the first of its commercial transportation eras.

Following this early period came the use of canals as commercial highways, and this means of commercial intercourse afforded easily operated and inexpensive transportation. The commerce during this period, as in the one immediately preceding it, was still predominantly domestic and carried on almost exclusively within the states and with what little interstate commerce there was, so small in quantity as to be practically negligible.

Our commercial transition began in the third epoch, with the introduction of steam as a motive power for machines, railroads and vessels. The names of Fulton, Stephenson, and Whitney stand forth brilliant beacons of prophecy of a future then trammelled with scepticism, ignorance and prejudice. But despite those deterrent influences, the advent of the steam locomotive, the steamboat, and the cotton gin, created an era which found its climax in the well-laid beginning of a great and varied commerce between the several states and with the world at large. A constructive period, both commercially and transportationally, it gave birth to the great economic movements which were later to develop the immeasurable natural resources of the country and create vast markets within the country and abroad. The rapid progress of this great commercial period was temporarily arrested by the internecine struggle between the north and the south, which, for the moment, plunged the country's commercial activity to its lowest ebb in the nation's history.

With the passing of the war and its immediate effects, industrial enterprise reasserted itself and commercial activity began its movement toward the unexploited west, with its vast and luring promises for the future. There came upon the country a realization of its unlimited resources and wonderful possibilities for the nation again united and devoted to pursuits of

peace. It was not alone a reconstructive period, but one of industrial and commercial expansion. Transportation, as a necessary function to give to commerce its new fields of activity, shared in the development, and great railroads were constructed with the aid of local, state and municipal powers and credit, as well as with the assistance of the national government.

With the growth of the railway system throughout the country, standardization of the facilities of carriage and methods of transportation became necessary in order to afford the required continuity in the movement of the articles of commerce. Still greater railroad systems were created by means of great corporate consolidations of management, operation, and properties, and much was done by the states and by local communities to encourage and further the building of lateral extensions and branch lines of railways. The rail carriers were looked upon as public benefactors, and special charters, with extraordinary privileges, were granted to builders of railroads by the states. By legislative approval and enactment, these charters, many times, became local laws. The right of eminent domain, a power supreme over the rights of the individual citizen, was delegated to the corporate carrier. Neither hindrance of law nor disapproval by public opinion stood in the way of the railroad locating itself wherever it might feel so disposed. In fact, so absolute and unrestricted were the rights and privileges granted to the earlier American railroads, that their power for good or evil was practically in their own hands.

Before the advent of the steam railroad, and while the commerce of the country was almost entirely conducted within the respective states, the regulation thereof, both state and interstate so far as then seemed essential, was left to the special legislation of the states and to the rules of the common law relating thereto. The power of the

federal congress, to regulate and control the diminutive commerce between the states which then existed, was never agitated, if, indeed, it was even seriously thought of at that time. Such land carriers as then existed had derived all of their rights from the states which, in those early days, had exclusive power to regulate such agencies.

On the other hand, water carriers performing their transportation function on the ocean, the rivers, and the lakes, had already been brought under the control and authority of the federal government under laws passed by Congress to regulate the "commerce on the ocean and other navigable waters." But the power of Congress to extend its authority over navigable waters within the states was seriously questioned, and finally resulted in the question being litigated. Upon the issue reaching the Supreme Court of the United States, that eminent tribunal declared that the jurisdiction of the federal authority was as complete over the waters of a state where they constituted a highway for interstate and foreign commerce, "so far as they concern such commerce," as it was over the ocean and coastwise waters of the country.⁽³⁾

§ 2. The Case of "Gibbons vs. Ogden."

The early constitutional history of the United States is by no means silent upon the complex question of distinguishing between the scope of the sovereign power of the federal government and the extent of the sovereign powers of the state with respect to the **interstate** and **intrastate** commerce of the country. It was the eminent jurist, Chief Justice Marshall, who first gave potent flexibility to his interpretation of the federal constitution and declared that the powers of the sovereign are divided between the government officers of the Union and those of the states.

(3) *Gibbons vs. Ogden*, 9 Wheat, (U. S.) 1, 6 L. ed. 23.

They are each sovereign with respect to the rights committed to it, and neither sovereign with respect to the rights committed to the other.⁽⁴⁾

The case of *Gibbons vs. Ogden*, *supra*, is the first of those great decisions of the highest judicial tribunal in the country giving constructive scope to the plenary powers of Congress for defining and regulating interstate commerce and those instrumentalities and their functions incidental to and directly concerned with its operations. The federal government is without general police powers, but it is, nevertheless, empowered to pass laws necessary for the administration of its constitutionally enumerated powers. It is a legislative body deriving all of its powers directly from the Constitution of the United States.⁽⁵⁾

The Supreme Court of Massachusetts said that it was a bold, wise and successful attempt to place the people under two distinct governments, each sovereign and independent within its own sphere of action, dividing the jurisdiction between them, not by territorial limits nor by the relation of superior or subordinate, but classifying the subjects of jurisdiction and designating those over which each had entire and independent jurisdiction.

At the time of the decision in *Gibbons vs. Ogden* the general government had, however, evinced no disposition to interfere with the state and common law regulation and control of the land carriers. The case concerned the constitutionality of the exclusive right to operate boats with fire or steam as motive power upon the waters within the state of New York, which had been granted by the state authorities, to the exclusion of vessels licensed by the federal government to operate in the coastwise trade. The question of the right of the state to exclude the

⁽⁴⁾ *McCulloch vs. Maryland*, 4 Wheat. (U. S.) 316, 438.

⁽⁵⁾ In the Opinion of Justices, 14 Gray 615.

federal-licensed-boat from the coastwise waters was the paramount issue carried to the Supreme Court and in the opinion of that court, written by Chief Justice Marshall, the great constitutionalist, the New York state-grant was held void as in contravention of the power vested in the general government by the commerce clause of the national constitution.⁽⁶⁾

While the federal government, at the time of this decision, abstained from any interference with the regulation of land carriers by the states, its assumption of exclusive jurisdiction over navigable waters, and the subsequent definement in the Supreme Court's declaration of the supremacy of the federal power over the agencies of commercial intercourse, laid the immutable basis of federal

⁽⁶⁾ Nowhere is the scope and effect of this learned judicial interpretation of the federal constitution better put than in the language of Mr. Frederick N. Judson, in his admirable treatise on "The Law of Interstate Commerce;" (2nd ed. section 6, page 11):—

"The broad and comprehensive construction of the term 'commerce' in this opinion is the basis of all subsequent decisions construing the commerce clause, and is the recognized source of authority. Commerce is more than traffic; it includes intercourse. The power to regulate is the power to prescribe the rules by which the commerce is to be governed. This power, like all others vested in congress, is complete in itself, and may be exercised to its utmost extent, and acknowledges no limitations other than as prescribed in the constitution. The power over commerce with foreign nations and among the several states, said the court, is vested in Congress as absolutely as it would be in a single government having in its constitution the same restrictions on the exercise of the power as is found in the Constitution of the United States. The power comprehended navigation within the limits of every state, so far as navigation may be in any manner connected with commerce, with foreign nations or among the several states, or with the Indian tribes, and therefore it passed beyond the jurisdictional line of New York and included the public waters of the state which were connected with such foreign or interstate commerce."

"The most important and far-reaching declaration in the opinion was that of the supremacy of the federal power, so that in any case of conflict the act of congress was supreme, and state laws must yield thereto, though enacted in the exercise of powers which are not controverted."

jurisdiction over the commerce moved by the inland carriers between the states as well as the respective agencies of such commercial intercourse. However, this latter extension of the federal authority was not undertaken by Congress until many years later.

Thus, in the third epoch of the nation's commercial and transportation development, the dawn of "interstate commerce" regulation was ushered in and the supremacy of the federal power first asserted, even though in connection with but a relatively negligible part of the country's commerce.

The fourth epoch in this wonderful era of commercial progress was impregnated with conditions which were inevitably destined to bring about the affirmative exercise of the federal authority over commerce between the states.

As we have seen, the land carriers were mostly corporate bodies,—artificial persons created by the sovereign power of the state and endowed thereby with unusual privileges and new rights. Presumptively and logically, the state could not create a body politic more powerful than itself or which it could not regulate and control. Theoretically this was true; in reality, the state government became enthralled in the meshes of its new corporate entities to the point of regulative inertia.

In addition to state statutes passed in the exercise of the state authority, the common law was still considered by many adequate to restrain the corporate land carriers from perpetrating wrongs against the public. In practice, however, while the power in the state was sufficient, its actual exercise in restraint of the land carriers was, in many ways deplorably ineffective. The corporate transportation entity had been nurtured and fostered until its proportions had become overwhelming. The grant to a corporation of the right to engage in and operate public utilities for private gain with unrestricted privileges of management and operation must inevitably tend

to monopoly; and it was this very evil which had become predominant in the period under consideration.

Eventually some of the states, by constitutional amendment, curbed the power of the legislature to grant such extensive corporate powers to the land carriers as had been the practice in the past, but, even in these instances, the state's exercise of its powers was confessedly incapable of complete or even effective regulation of the land carriers. To turn to the common law for relief was even more futile than to appeal to the state's authority, for **transportation** was unknown to the common law as it had developed under the newer agencies, and the scope of the common law to deal effectively with these corporate land carriers was very much in doubt and unsettled by the courts. And, so far as the federal power of control could be looked to for relief, the benefit derived therefrom was by way of negation rather than by affirmative restraint.

The mesh of these conditions became more and more complicated and involved as time went on. In the relationship which the corporate land carriers bore towards one another and towards the general public, conditions were interposed and considerations demanded which, in their general effect, amounted to making laws for themselves. Practically speaking, the carriers were left to themselves to formulate the conditions of their service, the charges therefor, the facilities they should furnish, their methods of handling the public's business, their arrangements for interchanging traffic, and the development of their own properties. The fixing of terms of their contractual relationships with the public they served, the uncertainty of the law and the difficulty and expense of invoking its aid, necessarily have anything but a wholesome effect upon the industrial, commercial and social life of the country at large, although it was in many ways

directly attributable to conditions which the public had subtly fostered upon the carriers.

Following the decision of the Supreme Court in *Gibbons vs. Ogden*, no further assertion of the federal power nor of the exercise thereof over the land carriers was attempted until 1866, when Congress passed the Act of June 15th of that year, authorizing railroad companies whose roads were operated by steam power to transport persons and property upon and over continuous lines of transportation.⁽⁷⁾

This act was reviewed by the courts, and the language of the Supreme Court of the United States, upholding the exclusive power of Congress,⁽⁸⁾ was prophetic of a more extensive exercise of the national authority.

(7) Section 5258, Revised Statutes of the United States, provides that—"Every railroad company in the United States whose road is operated by steam, its successors and assigns, is hereby authorized to carry upon and over its road, boats, bridges, and ferries, all passengers, troops, government supplies, mails, freight, and property on their way from any state to another state, and to receive compensation therefor, and to connect with roads of other states so as to form continuous lines for the transportation of the same to the place of destination. But this section shall not affect any stipulation between the Government of the United States and a railroad company for transportation or fares without compensation, nor impair or change the conditions imposed by the terms of any act granting lands to any such company to aid in the construction of its road, nor shall it be construed to authorize any railroad company to build any new road or connection with any other road without authority from the state in which such railroad or connection may be proposed. And Congress may at any time alter, amend, or renew this section."

(8) *Railroad Company, vs. Richmond*, 19 Wall. (U. S.), 584.

The Court said:—

"These Acts were passed under the power vested in Congress to regulate commerce among the several States, and were designed to remove trammels upon transportation between different States which had previously existed, and to prevent a creation of such trammels in future, and to facilitate railway transportation by authorizing the construction of bridges over the navigable waters of the Mississippi; and they were intended to reach trammels interposed by State enactments or by existing laws

The principal act reviewed by the court was the "Railroad Act of 1866,"⁽⁹⁾ which had been enacted in conjunction with some desultory legislative activity by the general government on the subject of the transportation of passengers and merchandise, having reference mainly to water carriers,⁽¹⁰⁾ and also in the matter of the transportation of nitro-glycerine and other explosives by either land or water carriers,⁽¹¹⁾ as subjects of commerce among the states. It was also legislatively provided that these "two perceding sections shall not be so construed as to prevent any State, Territory, district, city or town within the United States from regulating or from prohibiting the introduction thereof into such limits for sale, use or consumption therein."⁽¹²⁾

The Supreme Court in reviewing these sections declared:—

So far as these regulations made by Congress extend they are certainly indications of its intention that the transportation of commodities between the States shall be free, except where it is positively restricted by Congress itself, or by the States in particular cases by the express permission of Congress.⁽¹³⁾

The direct effect of this national legislation, and its subsequent construction and interpretations by the Supreme Court, was to authorize and facilitate the carriage of goods from one state into another. It in nowise interfered with the police powers of the state over interstate traffic, then existing, nor with the laws of the state safeguarding its property and the welfare of its people. The legislation gave emphasis, nevertheless, to one important premise of its later-to-be exercised

of Congress. * * * The power to regulate commerce among the several states was invested in Congress in order to secure equality and freedom in commercial intercourse against discriminating State legislation."

(9) See foot-note (8).

(10) Rev. Stats. U. S., sections 4252-4289, chapter 6, title 8.

(11) Rev. Stats. U. S., sections 4278-4279, chapter 6, title 8.

(12) Rev. Stats. U. S., section 4280, chapter 6, title 8.

(13) Un. Pac. R. Co. vs. Chicago, etc., R. Co. 163 U. S. 589.

control, and that was, that there should be guaranteed equal and unrestricted commercial intercourse between the states.

It would be a tragic review of the history of the times, and only a partial one, to confine ourselves to a recount of those cases of juggling of railroad properties, manipulation of stocks and securities, "freezing out" of the original and small investors in railroad organizations, and the inflation and watering of physical values, together with the financial disasters which accompanied the consolidations of competitive lines and the absorption of small and weak roads by stronger lines and systems, and to designate such review as typical of railway development in the United States.

The railroads, as a whole, have given more than they have received in the building of our industry and commerce, and deserve no such condemnation. True, there were many instances of prohibitive competition, disastrous rate wars, and subtle and unscrupulous practices by shrewd financiers and manipulators of railroad properties, but the practices of the carriers, in the aggregate, were far from being evil. Those that were iniquitous in character were incidental to the total result,—the building up of a tremendous national system of railroads adapted to the industrial and commercial development of a growing nation.

The concentration of ownership and management of the land carriers, the standardization of their tracks and equipment, the formation of continuous lines and through billing arrangements, the spanning of the great west with their steel highway, gave greater impetus to the rapidly increasing commerce between the states and by the early 70's the interstate commerce of the country had grown to enormous magnitude. The domestic commerce within the states was now small in quantity beside the tremendous volume of business passing between the states. Thus the

commercial conditions of the earlier periods had been reversed.

The fifth epoch in our commercial and transportation progress, the period beginning with the early 70's, witnessed a new turn of affairs, for in this period, as a result of the insistent demand by the public, affirmative regulation by the states began to be asserted.

Commercial historians and text writers have been prolific, and sometimes imaginative, in searching out and giving definition to the concrete acts of the corporate carriers which did violence to the letter and spirit of existing state laws and the unapplied and doubtful doctrines of the common law without giving proper weight to the practices of shippers which many times were the direct cause of the carriers' malfeasance. What ever the technical nature of the carriers' legal transgressions may have been, the evils which the public had to bear, and against which it rebelled, even though it not unwittingly and infrequently contributed thereto, were the unwarranted discriminations between persons and between localities and the inequalities and obnoxious conditions attendant upon the public's use of the nation's transportation facilities and service. This was a burden intolerable with the principles of free and unrestricted commercial intercourse guaranteed by the national constitution.

§ 3. The "Granger Cases."

The action taken by the prominent grain-producing states of the west in seeking to control and regulate their railroads was appealed from these carriers to the courts, in proceedings popularly known as the "Granger Cases." In the state courts the carriers lost, and appealed therefrom to the Supreme Court of the United States, and that court in disposing of the appeals affirmed the right of the states to so regulate the

carriers because of the absence of any affirmative action by Congress establishing such regulation.

While the carriers attacked the state legislation on the ground that it affected commerce between the states, the Supreme Court declared that the regulation attempted by the state was of domestic concern and confined to the commerce of the state and to "such interstate commerce as directly affected the people of the states," and that "until Congress acted in reference to their interstate relations and undertook to legislate for those who are without the State, the State might exercise all the powers of government necessary for the promotion of the general welfare of those within its jurisdiction, even though in so doing it might indirectly affect those without, and indirectly operate upon commerce outside its immediate jurisdiction, and, therefore, the acts were valid in the absence of regulation by Congress."⁽¹⁴⁾

⁽¹⁴⁾ Moore on Interstate Commerce, section 11, page 25, and cases cited in footnote ⁽¹⁹⁾.

CHAPTER II.

EXERCISE OF FEDERAL AUTHORITY.

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CHAPTER II.

EXERCISE OF FEDERAL AUTHORITY.

§ 1. What is "Commerce?"

"Commerce" is, in its literal sense, generally understood to mean the process of exchange of property in the function of "trade,"—i. e., in the buying and selling of commodities. However, modern civilization and commercial practices give to its abstract meaning a much broader scope. One of the earliest legal definitions of the term by the courts was in the famous case of *Gibbons vs. Ogden*, *supra*, where it was said:—

"Commerce, in its simplest signification, means an exchange of goods, but in the advancement of society, —labor, transportation, intelligence, care, and various mediums of exchange, become commodities, and enter into commerce; the subject, the vehicle, the agent, and their various operations, become the objects of commercial regulation. * * * Commerce, undoubtedly, is traffic, but it is something more, it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on the intercourse."

It has also been said by the courts that commerce "includes the usual agencies of communication and transportation employed to affect the change." ⁽¹⁾

Inasmuch as the word "commerce," as used in the consti-

⁽¹⁾ *People, ex rel., vs. Reardon*, 184 N. Y. 431, 432; 77 N. E. Rep. 970.

tution of the United States, is without distinction as to its scope or operation, we must look to the judicial interpretations and constructions of the commerce clause of the constitution for a comprehensive view of its possibilities and objective. The main distinction which the courts have drawn with respect to it is that it embraces not only the function involved in making the exchange, but the things exchanged, and the persons engaged in contracting therefor. It includes the mediums of intercourse and communication, such as horses and wagons, railroads, vessels, and the navigable waters upon which they ply to the extent of such use.

Mr. Frederick Judson, in his "Law of Interstate Commerce,"⁽²⁾ calls attention to the case of the Pensacola Telegraph Company,⁽³⁾ which in commenting upon the rule laid down in *Gibbons vs. Ogden*, *supra*, added that **commercial intercourse** "was not confined to the instrumentalities of commerce known or in use when the constitution was adopted," but extended from the instrumentalities of earlier days to the railroad, the telegraph, and the successive agencies of commercial evolution.

It is apparent, therefore, that "commerce" as judicially viewed is given sufficient scope to include not only the object exchanged, but also the agency of exchange, or communication and the persons involved in its operation, in order to give substantive premise for the exercise of the co-efficient power of the federal government to enforce the intended effectiveness of the commerce clause of the constitution.

(2) Judson's "Law of Interstate Commerce," (2nd ed.) section 7, page 12.

(3) 96 U. S. 1, 24 Law ed. 708, 711, the Court stating:—

"They extend from the horse with its rider to the stage coach, from the sailing vessel to the steamboat, from the coach and steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate at all times and under all circumstances."

There are, however, things incidental to the operation of commerce but which cannot be included as a part of it, such as the contractual relationships which are involved in and essential to commercial intercourse. The bill of lading, as a document of title, is a symbolic representative of the property transported in the process of commerce, but it is merely incidental to commerce and not a part of it. This accounts for the lack of authority in the federal government to deal with bills of lading as is explained in the chapters relating to bills of lading. Bills of exchange, notes, drafts, etc., while all essentially instrumentalities of commerce, are excluded from being parts of commerce because of their merely contributory nature.

Likewise, there are things which are not subjects of commerce, as for instance, articles and persons whose presence in commercial transactions are in contravention of the police regulations of a state safeguarding the moral and physical welfare of its people. There are many decisions of the courts dealing with the restricted inclusion in commerce of such persons as paupers, immoral persons, convicts, and persons afflicted with contagious diseases, and with such articles as spirituous liquors, explosives, diseased animals, oleomargarine, tobacco in certain forms, etc.

The question of the application of the "original package" rule was early involved in the commerce of the states with relation to the state's police and taxing powers. The question ⁽⁴⁾ arose as to when the state's taxing power began to operate and the courts, as early as 1827, held that it began when the "original package" in which the goods were received in importation was broken up or sold,—the word "import," at that time, having local significance as between the states. Subsequently, in the development of the expressed intent of the federal government that interstate commerce should be free as between the states, the original package rule came to have no application in the commerce between the states. So, while

the original package rule has been adhered to with respect to the state's power to tax certain imports from foreign countries, goods brought from one state into another are subject, in common with other property in that state, to taxation whether in the original package or not.

§ 2. Constitutional Powers; exclusive Federal Authority, and Authority Concurrent with the State.

The federal government is without inherent sovereignty, but derives its authority from the enumerated powers vested in it by the constitution of the United States and its co-efficient power to pass such laws as may be necessary to carry into effect the specific powers conferred by the constitution itself. The national constitution contains nine enumerated powers from which the federal government derives its authority over interstate commerce. These enumerated powers, including those embraced in the "commerce clause," are as follows:—

(1) The congress shall have power * * * to regulate commerce with foreign nations, among the several states and with the Indian tribes.⁽⁵⁾

(2) To establish post offices and post roads.⁽⁶⁾

(3) The congress shall have power to make all laws which shall be necessary and proper for carrying into effect the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department, or officer thereof.⁽⁷⁾

(4) No tax or duty shall be laid on articles exported from any state.⁽⁸⁾

(5) No preference shall be given by any regulation of commerce or revenue to the ports of one state over those

⁽⁴⁾ Judson's "Law of Interstate Commerce," section 17, page 30, and cases cited.

⁽⁵⁾ Const. U. S., Art. I, section 8, paragraph 3.

⁽⁶⁾ Const. U. S., Art. I, section 8, paragraph 7.

⁽⁷⁾ Const. U. S., Art. I, section 8, paragraph 18.

⁽⁸⁾ Const. U. S., Art. I, section 9, paragraph 5.

of another; nor shall vessels bound to or from one state be obliged to enter, clear, or pay duties in another.⁽⁹⁾

(6) The citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states.⁽¹⁰⁾

(7) This constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.⁽¹¹⁾

(8) The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.⁽¹²⁾

(9) All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. ⁽¹³⁾ ^(13a)

§ 3. The "Commerce Clause" of Article I of the Constitution of the United States.

The "commerce clause" of Article I of the Constitution of the United States vests in the federal government the power "to regulate commerce * * * among the several states." The history of its judicial interpretation is a striking illus-

(9) Const. U. S., Art. I, section 9, paragraph 5.

(10) Const. U. S., Art. IV, section 2.

(11) Const. U. S., Art. VI, section 2.

(12) Const. U. S., Amendt. X, January 8, 1798.

(13) Const. U. S., Art. XIV, section 1.

(13a) *Banaka vs. Missouri Pacific Ry. Co.*, 186 S. W. Rep. 7.

tration of the "adaptation of a written constitution by construction to conditions and emergencies never contemplated by its framers," ⁽¹⁴⁾ for it is beyond belief that the venerable framers of this great document of human rights could have anticipated the tremendous scope which was to be subsequently given it by the courts in judicially determining the extent of the federal authority over interstate commerce and its then-unknown agencies.

The preference clause in the constitution ⁽¹⁵⁾ is a distinct restraint of the powers of the federal government, insuring freedom and equality in the commerce between the states, as contradistinguished from the unqualified power of the general government over commerce with foreign nations and with the Indian tribes.

In the opinion of the Attorney-General of the United States Moody, in 1905, delivered to the United States Senate, ⁽¹⁶⁾ reasonable rates determined by legislative authority would not constitute a preference between the ports of different states within the prohibition of Article I, section 9, paragraph 5, of the constitution, even though they resulted in a varying charge per ton per mile to and from the ports of the different states. ⁽¹⁷⁾

The reference alone to "ports" in the language of the constitution is due to the fact that at that time the commerce among the states was carried on wholly by navigation, with the exception of the slight amount handled by wagon; but this intent of restraint has been deemed sufficient by the courts to judicially apply it in general restraint of the regulation of interstate commerce by the national government under modern conditions and agencies. ⁽¹⁸⁾

⁽¹⁴⁾ Judson's Law of Interstate Commerce, section 1, paragraph 2.

⁽¹⁵⁾ Const. U. S., Art. I, section 9, paragraph 5.

⁽¹⁶⁾ Vol. II, Senate Reports, page 1674.

⁽¹⁷⁾ Judson's Law of Interstate Commerce, section 3, page 7, footnote 1.

⁽¹⁸⁾ Morgan, etc., Co. vs. Bd. of Health, 118 U. S. 455.

§ 4. "Federal Sovereignty in Interstate Commerce."⁽¹⁹⁾

For many years it was a debated question whether the authority of the federal government to regulate interstate commerce was a unit, and the investment thereof in Congress ex-

⁽¹⁹⁾ Mr. Judson, in his "Law of Interstate Commerce," writes of the subject of "Federal Sovereignty in Interstate Commerce" as follows:—

"The federal authority in interstate commerce is enforced not only by the power of regulation granted to congress by the constitution, but also by the exercise of other expressly enumerated powers of congress, more or less directly relating to interstate commercial intercourse. Thus the power to establish post offices and post roads, to coin money, to establish uniform systems of bankruptcy, to grant patents for discoveries, and most important of all the taxing power, are closely associated with commercial relations and activities. There is also what has been termed the "co-efficient power," the power to make all laws necessary and proper to carry into effect the foregoing powers, and all other powers vested by the constitution in the government of the United States or in any department or officer thereof."

"The broad and comprehensive construction given to this co-efficient power, in selecting measures for carrying into execution the constitutional powers of the government has made academic rather than practical the long debated distinction between the express and implied powers of congress. The words "necessary and proper" are not limited to such measures as are absolutely and indispensably necessary, without which the powers granted must fail of execution, but they include all proper means which are conducive or adapted to the end to be accomplished, and which in the judgment of congress will most advantageously effect such end.

"The federal authority in interstate commerce, as in other matters, does not rest on a mere aggregation of the enumerated powers. Although the government of the United States is one of enumerated powers, and under the tenth amendment the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people, it is also true that there is a national sovereignty—a national Federal State—within the scope of the enumerated powers, and the constitution and laws of the United States are the supreme law of the land. Upon this broad principle of the sovereignty growing out of the aggregation of enumerated powers was based the power to charter a national bank, the power to exercise the right of eminent domain, the power to issue legal tender notes, and the power to exclude aliens. The power to issue legal tender notes, which was strongly controverted, was based upon two enumerated powers, that of coining money and thereby establishing a national currency, and also upon the commerce power. It was also declared to be a power inherent in sovereignty, as exercised by other sovereignties at the time of the adoption of the constitution, and not expressly withheld by the constitution from congress."

clusive, and that, therefore, no part of this power could be exercised by a state, or that the grant to Congress of this power was not a prohibition against the exercise of the power by the state, in the absence of exercise thereof by the general government, or that in the absence of general police powers in the federal government, the authority of the state to exercise its sovereign police power was exclusive.⁽²⁰⁾ Much vexatious confusion resulted from this uncertainty in the concur-

"As a political sovereignty the government of the United States may by physical force, through its official agents, in the enforcement of its powers, exercise complete sovereignty over every part of American soil which belongs to it. There is a "Peace of the United States," and this "peace" can be enforced by the executive in the protection of the judicial officers of the United States throughout the United States and within the limits of any State. These fundamental principles were very strongly asserted in the Debs case where the court said that the government of the United States, in the exercise of its power over the mails and its protecting interstate commerce, had jurisdiction over every foot of soil in its territory and acted directly upon every citizen. The decision was expressly based upon the sovereign power of the United States within the limits of its enumerated powers, and on the power of the government to enforce that sovereignty through the executive or through the courts, acting directly through the citizens and not through the agencies of a state, when the federal authority is resisted.

"The complexity of our federal governmental system includes this distinct sovereign power in the federal government with sovereign powers in the state. In the language of Chief Justice Marshall, the powers of a sovereign are divided between the government officers of the Union and those of the states. They are each sovereign with respect to the rights committed to it, and neither sovereign with respect to the rights committed to the other. The Supreme Court of Massachusetts said that it was a bold, wise and successful attempt to place the people under two distinct governments, each sovereign and independent within its own sphere of action, dividing the jurisdiction between them, not by territorial limits nor by the relation of superior or subordinate, but classifying the subjects of jurisdiction and designating those over which each had entire and independent jurisdiction."

"The federal government, therefore, though sovereign within the sphere of its enumerated powers, has not what has been termed inherent sovereignty, nor has it any general police powers; but with its wide scope of selection of the means for the execution of its enumerated powers the distinction is hardly a practical one in the actual working of our dual political system."

(20) *Passenger and License Cases*, *supra*.

rent and exclusive exercise of the prerogatives of Congress and of the state.

In 1851, the rule which has been the basis of subsequent adjudications was finally declared to the effect that the power to regulate commerce is one which includes many subjects,⁽²¹⁾ various and quite unlike in their nature, and that whenever these subjects are in their nature national, or admit only of one uniform system or plan of regulation, they may be justly held to belong to that class over which Congress has exclusive power of regulation; but that local and limited matters, not national in their nature, may be regulated by the states during the inaction of Congress. The action of Congress, however, renders such regulations of the states void when in conflict therewith.⁽²²⁾

§ 5. Kinds of Commerce Cases.

The Supreme Court of the United States in the *Covington Bridge Company* case⁽²³⁾ after a lengthy review of the decisions construing and applying the commerce clause of the constitution, distinguished the three classes of cases or questions which might arise under the commerce clause as follows:

First. Those cases wherein the state power is exclusive;

Second. Those cases wherein the authority is concurrent with the state's, and where it is not the existence of the power in Congress, but the exercise of it, which is incompatible with the exercise of the same power by the state; and

Third. Those cases wherein the authority of Congress is exclusive, and where it is not the exercise of the power by Congress, but its very existence in that body, which excludes the power of the state.⁽²⁴⁾

(21) *Cooley, vs. Bd. of Wardens*, 12 How. (U. S.) 299.

(22) *Judson's Law of Interstate Commerce*, section 23, page 39, note 6.

(23) *Covington, etc., Co. vs. Kentucky*, 154 U. S. 204.

(24) *Judson's Law of Interstate Commerce*, section 24, page 40.

It was only in the cases of the second class that opportunity was offered for friction between the federal and state powers.

Thus, from the standpoint of the state, the concurrent power of the state may lie, however, where the exercise of the federal power is not at variance with or incompatible with the exercise of the same power by the state and the existence of the power in Congress, but unexercised by it, admits of the exercise of the power by the state until the federal power is asserted.

§ 6. What Constitutes "Interstate Commerce"?

To define "interstate commerce" in view of the judicial construction and interpretation of the commerce clause in the constitution would seem to be a comparatively simple matter, yet in reality, the contrary is true. "Interstate commerce" is difficult of definition sufficiently comprehensive to embrace all of its ramifications under judicial interpretation and the practices of commerce.⁽²⁵⁾

(25) Definitions of "Interstate Commerce."

"Commerce among the States * * * means commerce which concerns more States than one—not mere internal regulation and traffic."

State vs. Foreman, 8 Yerg. (Tenn.) 256, 316.

"Interstate Commerce, or commerce among the States, means the exchange of property in one State for property in another State. Its essential characteristic is that the property affected must be transported to some point without the State. There must be interstate movement of property * * * There can be no interstate commerce without interstate transportation of property."

People vs. Readon, 184 N. Y. 431 452.

"It comprehends, as it is said, intercourse for the purpose of trade in any and all its forms, including transportation, purchase, sale, and exchange of commodities between the citizens of different States."

Hopkins, vs. U. S., 171 U. S. 578, 597.

"If any commercial transaction reaches an entirety in two or more States, and if the parties dealing with reference to that

The investiture of Congress with power to regulate interstate commerce or the "commerce between the States" was for the purpose of insuring uniformity in its regulation and to prohibit restrictive or discriminatory regulation by the states.

The following distinctions may be sharply drawn as to when commerce becomes interstate in character:

1. The contract of carriage of property to a point outside of the state in which it originates, determines the shipment as interstate.

2. As soon as the transportation begins of an article destined without the state it becomes a part of the interstate commerce of the country. Nor if the shipment be stopped in transit within the state in which it originated, without express intention shown to deviate from the original destination for one within the state, and to reach which the shipment does not have to pass out of the state, the interstate character of it is not removed.

transaction deal from different States, then the whole transaction is a part of the interstate commerce of the United States, and subject to regulation by Congress under the Constitution."

In re Charge to Grand Jury, 151 Fed. Rep. 834.

"Commerce between States consists of intercourse between their citizens and includes the transportation of persons and property and the navigation of public waters for that purpose as well as the purchase, sale, and exchange of commodities, and the power to regulate that commerce involves the right to prescribe rules by which it shall be governed. Commerce among the States comprehends intercourse for the purpose of trade in any and all its forms, including transportation, purchase, sale, and exchange of commodities between the citizens of different States."

Moore on Interstate Commerce, section 5, page 8.

"When the subjects of commerce are national in character and require uniformity of regulation affecting alike all the States, the power of Congress is exclusive. The commerce between the States which consists in the transportation of persons and property between them, is a subject of national character and requires uniformity of regulation. Congress alone can deal with such transportation, and its non-action is a declaration that it shall remain free from burdens imposed by State legislation."

Barnes on Interstate Commerce, section 28A, page 65, and cases cited.

3. Again if the shipment's origin and destination are both within the same state, but in the course of its movement it passes through any part of an adjoining state, it still retains its character of interstate commerce.

4. Where the contract of carriage for a shipment is entered into for the movement thereof outside of the state in which it originates, it is interstate, and its interstate character cannot be changed except by a change in the contract for its transportation.

5. Where a shipment originates in one of the states destined to a point in a different state, and in the course of its movement passes through an adjacent foreign country, its entire transit comes within the interstate commerce jurisdiction of the federal government.

6. If property is transported between ports within the same state, and in its movement passes over the public waters, or the ocean, the jurisdiction of the federal government obtains to the complete exclusion of state authority, for in order to be divested of its interstate character commercial intercourse must be within the exclusive jurisdiction of the state at all times during its movement.

An abstract definition of "interstate commerce" may be, therefore,—all subjects of commerce and commercial intercourse, including all instrumentalities of and persons engaged in the transportation thereof, which are of a national character and require uniformity of regulation and which are not at all times within the exclusive jurisdiction of the state.

§ 7. Regulation of Interstate Commerce.

As the varying and restrictive legislation of the states became more pronounced, grave economic situations arose due to the confusion occasioned by the numerous systems of local state regulation and control. Coupled with these conditions, the effect of the unrestricted practices of the carriers them-

selves had led to wide-spread discriminations in service and rates, and the federal government finally exercised its power of regulation in 1887. Full credit must be accorded the courts of the country for pointing out the necessity for federal activity and paving the way, by wise and clear judicial constructions of its powers, for the general government to assert the exercise of such existing powers.

The Supreme Court of the United States, in 1886, declared for the unity of the country in matters pertaining to the regulation of interstate commerce, and again in the same year pointed out emphatically that the regulation of railway traffic by the state did not and could not extend to interstate traffic or commerce in any form, and that the regulation of such interstate shipments was exclusively confined to Congress. The court went even further and declared for the first time that the right of interstate commerce was so essentially national in character that the inaction of the federal government was equivalent to its determination that the commerce should be free and the state wholly without power to interfere with or regulate the right to carry on such commerce.⁽²⁶⁾

While there had been pending in Congress for several years tentative bills for the federal regulation of interstate commerce it was not until after the decision in *Wabash, St. L. & P. R. R. Co. vs. State of Illinois*, *supra*, handed down by the Supreme Court of Illinois, where the lack of power in the states to regulate interstate commerce was clearly demonstrated, and a country-wide demand made for action by Congress towards the exercise of its powers as judicially suggested by the Supreme Court of the United States, that Congress, on February 4, 1887, passed the original Act to Regulate Commerce. The act was modeled after the English Railway Acts⁽²⁷⁾ and at

⁽²⁶⁾ *Wab., St. L. & P. R. R. Co. vs. Illinois*, 104 Ills. 476.

⁽²⁷⁾ English Railway Acts:—Railways Clauses Consolidation Act of 1845; Ry. & Canal Act, 1854; Reg. of Rys. Act, 1873.

the time of its enactment the exercise of the plenary power of the federal government was thought sufficient to remove entirely the evils and distress against which the provisions of the act were directed.

Entire equanimity of mind did not prevail among the members of Congress at the time of the passage of the original Act to Regulate Commerce, particularly as to the construction to be placed upon the phrase "under substantially similar circumstances and conditions" incorporated into the provisions of the long-and-short haul clause in the fourth section of the Act, and as to the prohibition of pooling the freight; but withal the constitutionality of the Act—the power of Congress to enact the scheme of regulation embraced in the statute—was never seriously questioned. There was, however, serious and persistent attack upon the extent of power vested in the Interstate Commerce Commission—the administrative body created by the statute to enforce its provisions—by the terms of the Act, as well as the construction to be placed upon several sections of the law, relating to such powers.

The subsequent persistent agitation for curative legislation and judicial discussion and review of these questions led to several amendments to the original Act and the passage of certain supplementary acts. The last amendment to the act was made in 1916, and is known as the "Cummins Amendment to the Act to Regulate Commerce" prohibiting generally all forms of limitation of carrier's liability in bills of lading and shipping papers.⁽²⁸⁾

§ 8. Amendments to the Act to Regulate Commerce.

The Act to Regulate Commerce has from time to time, been amended in order to remove and remedy certain weaknesses in the original act pointed out by the courts and to effect ex-

⁽²⁸⁾ For full text of original Act to Regulate Commerce, see Appendix, Part IV.

tensions in the scope and authority of the Interstate Commerce Commission. Amendments to the act were passed in 1889, 1891, 1893, 1895, 1903, 1906, 1908, 1910, 1912, 1913, 1915, and 1916.

(1) **Amendment of March 2, 1889.**⁽²⁹⁾ By the enactment of March 2, 1889, the original Act was amended to give the shipper an effective remedy by mandamus to compel the movement of interstate commerce or the furnishing of cars or other transportation facilities.⁽³⁰⁾

(2) **Amendment of February 10, 1891.**⁽³¹⁾ The amendment of February 10, 1891, enlarged the provisions of section 12, compelling the attendance of witnesses and the production of documentary evidence from any place in the United States and at any designated point of hearing and also provided for the taking of necessary depositions.⁽³²⁾

(3) **Amendment of February 11, 1893.**⁽³³⁾ The defect in section 12 was remedied by the amendment of February 11, 1893, compelling self-incriminating testimony.⁽³⁴⁾

(4) **Amendment of February 8, 1895.**⁽³⁵⁾ The amendment of February 8, 1895, added to section 22 a proviso permitting the issuance of joint interchangeable five-thousand mile tickets with special privileges as to the amount of free baggage to be carried under mileage tickets of one thousand or more miles.⁽³⁶⁾

(5) **Supplementary Act of February 11, 1903.**⁽³⁷⁾ The

⁽²⁹⁾ 25 Stats. at Large 855; 1 Supp. Rev. Stats. U. S. 684.

⁽³⁰⁾ For full text of amendment of March 2, 1889, see Appendix, Part IV.

⁽³¹⁾ 26 Stats. at Large, 743; 1 Supp. Rev. Stats. U. S. 891.

⁽³²⁾ For full text of amendment of February 10, 1891, see Appendix, Part IV.

⁽³³⁾ 27 Stats. at Large, 443.

⁽³⁴⁾ For full text of amendment of February 11, 1893, see Appendix, Part IV.

⁽³⁵⁾ 28 Stats. at Large, 643; 2 Supp. Rev. Stats. U. S. 369.

⁽³⁶⁾ For full text of amendment of February 8, 1895, see Appendix, Part IV.

⁽³⁷⁾ 32 Stats. at Large, 823; as amended by an act approved June 25, 1910.

Expedition Act, passed February 11, 1903, effected an addition to the Act to Regulate Commerce providing for expediting the procedure in suits brought by the United States or suits prosecuted in the name of the Commission by the attorney-general.⁽³⁸⁾

(6) **Supplementary Act of February 19, 1903,⁽³⁹⁾ Elkins Act.** The amendment of February 19, 1903, known as the Elkins Act, affected sections 2, 6, and 10, of the Act to Regulate Commerce. In its most important aspect it was intended to strengthen certain provisions of the general act and abolish rebating by heavily increasing the fines therefor.

The Elkins Act made the published tariff of the carrier the standard of lawfulness in the demand and collection of transportation charges, declaring any departure therefrom a misdemeanor. It also made the act of any person acting for or in the employ of any carrier subject to the act, and acting within the scope of his employment, the act of such carrier. Thus, the violation of the Act by the employee was in such instances the offense of the carrier.

This Act, as originally enacted, also abolished the penalty of imprisonment but this feature was restored three years later by the Hepburn amendment in 1906. The amendment effected through this supplemental legislation made the carrier corporation liable to prosecution in cases where its officers or agents were liable for violations of the original Act to Regulate Commerce, such agents and officers continuing to be liable as theretofore. Jurisdiction of prosecutions of offenses under the new act was vested in the United States courts having jurisdiction of crimes within the district in which the violation was committed or the transportation passed through.⁽⁴⁰⁾

(38) For full text of amendment of February 11, 1903, see Appendix, Part IV.

(39) 32 Stats. at Large, 847; amended in 34 Stats. at Large, 584.

(40) For full text of the Elkins Act, see Appendix, Part IV.

(7) **Amendment of June 29, 1906.**⁽⁴¹⁾ The most important and extensive amending of the Act was accomplished by the legislation of June 29, 1906, known as the Hepburn Act. These amendments broadened the scope of the Act by including pipe lines, express companies and sleeping car companies as common carriers subject thereto and included all cars and vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported.

A commodity clause was included in the amendments prohibiting a carrier from transporting its own commodities.

A very substantial enlargement of the powers of the Commission was afforded by the amendments. Free passes were prohibited, connections between railway lines required, punishment by imprisonment restored, establishment of through routes by the Commission with liability upon the initial carrier for damage to a through shipment, and certain reports and forms of accounts of carriers were required.

From an economic standpoint, the most important of these enlarged powers of the Commission was that authorizing it to establish through routes and joint rates, and also to determine just and reasonable rates to be thereafter charged as well as any just, reasonable, or fair regulation respecting the transportation to be followed in the future. A limit of two years was fixed as the time wherein any order of the Commission should be in force.

The main purpose of the legislation, said the Commission, in its annual report for 1907, was to provide more adequate means for the enforcement of rights and duties already declared to exist.

⁽⁴¹⁾ 34 Stats. at Large, 584.

Following the passage of the Hepburn Act, the Commission devoted a considerable part of its time to the giving of administrative construction to various provisions of the amended law for the guidance of both shippers and carriers, for it was obvious that the best results secured with the least possible delay could only be enjoyed through a correct and uniform interpretation of the statute. Numerous rulings explaining the Commission's view and application of different sections and paragraphs of the statute were promulgated and in practically every instance accepted by the carriers, even in cases where their legal advisers were not entirely in accord with the opinion of the Commission.⁽⁴²⁾

⁽⁴²⁾ The Commission in its Annual Report, for 1907, commented on the immediate effects of the Hepburn Act (amendment of June 29, 1906), as follows:—

"The amended law has now been in force for upwards of fifteen months, and some opinion may be expressed as to its operation and effects. The substantive provisions of the original act, forbidding the exaction of unreasonable charges and prohibiting discriminations between persons and places, were unchanged by the legislation of 1906. The main purpose of that legislation was to provide more adequate means for the enforcement of rights and duties already declared to exist. The vital principle of a right is found in the obligation to respect it. Without remedial procedure the declaratory portion of any law is little more than the statutory expression of a sentiment, but when efficient machinery for securing observance is provided the performance of definite duties and the recognition of definite rights may be expected to follow in ordinary conduct without resort to litigation. That this is true in regard to the amended act, and to an extent not generally appreciated, is confidently asserted. Just as the value of criminal laws is measured by the peace and security of society rather than the occasional conviction of offenders, so the salutary effects of the present statute are shown in the more general enjoyment of previously existing rights rather than by the number of cases in which the authority of the Commission has been invoked or the list of decisions and prosecutions which makes up the record of administration.

It is likewise true that the substantial and permanent benefits of this law are indirect and frequently unperceived even by those who in fact profit by its observance. It means much for the present and more for the future that the principles of this law have gained greatly in general understanding and acceptance. The injustice of many practices which were once almost characteristic of railway operations is now clearly apprehended, and an insistent public sentiment supports every effort for their suppression. By railway managers almost without exception the

The Hepburn Act became a law on June 29, 1906, and under joint resolution took effect sixty days after its approval, to-wit: August 28, 1906.⁽⁴³⁾

amended law has been accepted in good faith, and they exhibit for the most part a sincere and earnest disposition to conform their methods to its requirements. It was not to be expected that needed reforms could be brought about without more or less difficulty and delay, but it is unquestionably the fact that great progress has been made and that further improvement is clearly assured. To a gratifying extent there has been readjustment of rates and correction of abuses by the carriers themselves. Methods and usages of one sort and another which operated to individual advantages have been voluntarily changed, and it is not too much to say that there is now a freedom from forbidden discriminations which is actual and general to a degree never before approached. As this process goes on, as special privileges disappear and favoritism ceases to be even suspected, the indirect but not less certain benefits of the law will become more and more apparent.

An incidental respect in which equality of treatment has been greatly promoted is in such matters as switching, terminal, demurrage, reconsignment, elevation, and other charges making up the aggregate cost of transportation. In the past it was often within the power of a carrier to waive charges of this nature in favor of particular shippers while collecting them from business rivals. Now the law and the rules of the Commission require all charges of this description to be plainly stated in the tariffs and to be applied with the same exactness and uniformity as the transportation rate itself. This is only one of the ways in which distinct advance has been made toward placing competing shippers in each locality upon a basis of equality in the enjoyment of a public service.

It is this general and marked improvement in transportation conditions that the Commission observes with special gratification. The amended law with its enforceable remedies, the wider recognition of its fundamental justice, the quickened sense of public obligation on the part of railway managers, the clearer perception by shippers of all classes that any individual advantage is morally as well as legally indefensible, and the augmented influence of the Commission resulting from its increased authority have all combined materially to diminish offensive practices of every sort and to signally promote the purposes for which the law was enacted.

This results in the voluntary adjustment by the parties without resort to the Commission of a vast number of controversies which otherwise would ripen into complaint and litigation, while in numerous instances a settlement is effected by the friendly intervention of the Commission, through correspondence or personal interviews, between the shipper and carrier directly concerned."

⁽⁴³⁾ Exhaustive hearings were conducted by the Senate and House Interstate Commerce Committees, during the course of

(8) **Amendment of April 13, 1908.**⁽⁴⁴⁾ The fourth paragraph of section 1, of the Act, was amended by the enactment of April 13, 1908, giving greater certainty to the persons to whom free passes or franks might be given.⁽⁴⁵⁾ This same part of the law was again amended by the legislation of June 18, 1910.

(9) **Amendment of June 18, 1910.**⁽⁴⁶⁾ The act of June 18, 1910, commonly known as the Mann-Elkins law enlarged the substantive provisions of the Act to Regulate

which the Attorney-General of the United States, upon request, rendered the following opinion which will be found in Senate Reports, volume II, page 1674 (May 5, 1905).

"1. There is a governmental power to fix the maximum future charges of carriers by railroad, vested in the legislatures of the states with regard to transportation exclusively within the states, and vested in congress with regard to all other transportation.

"2. Although legislative power, properly speaking, cannot be delegated, the law-making body, having enacted into law the standard charges which shall control, may intrust to an administrative body not exercising in the true sense judicial power, the duty to fix rates in conformity with that standard.

"3. The rate-making power is not a judicial function and cannot be conferred constitutionally upon the courts of the United States, either by way of original or appellate jurisdiction.

"4. The courts, however, have the power to investigate any rate or rates fixed by legislative authority and to determine whether they are such as would be confiscatory of the property of the carrier, and if they are judicially found to be confiscatory in their effect, to restrain their enforcement.

"5. Any law which attempts to deprive the courts of this power is unconstitutional."

He also advised that reasonable rates determined by the legislative authority would not constitute a preference between the ports of different states within the prohibition of article 1, section 9, paragraph 6, of the Constitution, even though they resulted in a varying charge per ton per mile to and from the ports of the different states.

Also included in Judson on Interstate Commerce, 2nd ed., section 51, pages 79, 80, footnote 1.

(44) 35 Stats. at Large, 60.

(45) For full text of amendment of April 13, 1908, see Appendix, Part IV.

(46) 36 Stats. at Large, 539.

Commerce, corrected numerous defects, which experience had disclosed, conferred upon the public new rights and remedies, and correspondingly increased the jurisdiction and authority of the Commission. As in the period following the enactment of the Hepburn law of 1906, much consideration was given to the administrative interpretation of the amended act for the guidance of shippers and carriers. The questions presented involved the application to daily transactions between carriers and shippers of substantially every provision of the amended statute.

Immediately following the passage of the Mann-Elkins law the Commission was called upon to exercise what is perhaps the most far-reaching and fundamentally important power conferred upon it by that act, namely, the authority to suspend proposed advances in rates pending investigation of their propriety. In the first half of 1910 numerous carriers had given notice of general advances in rates, and it was commonly understood that other carriers would shortly take similar action. As a result of conferences between the Government authorities and representatives of the carriers, the dates on which the proposed advances were to become effective were postponed pending the passage of the bill then under consideration by the Congress, and section 12 of that bill was made effective upon its passage in order that the Commission might at once institute investigations thereunder. Thereupon two general investigations were instituted, one relating to the general advances in rates proposed by eastern carriers and the other to those proposed by western carriers. In both proceedings organizations of shippers asked for and were given leave to intervene.⁽⁴⁷⁾

(10) **Amendment of August 24, 1912.**⁽⁴⁸⁾ By the provi-

⁽⁴⁷⁾ For full text of amendment of June 18, 1910, see Appendix, Part IV.

⁽⁴⁸⁾ 37 Stats. at Large, 566.

sions of the amendment of August 24, 1912, known as the Panama Canal Act, the jurisdiction of the Interstate Commerce Commission over carriers by water was extended.

The Act to Regulate Commerce applied to carriers by water only when engaged in transportation "partly by railroad and partly by water when both were used under a common control, management, or arrangement for a continuous carriage or shipment." Section 11 of the Panama Canal act amended section 5 of the Act to Regulate Commerce by adding a paragraph, which may be summed up in the following words: From and after July 1, 1914, it has been unlawful for any common carrier subject to the act to own or to have any interest whatsoever in any common carrier by water or any vessel with which the aforesaid common carrier does or may compete for traffic. The Commission is given jurisdiction to determine questions of fact as to the competition or possibility of competition, and may, if it is of the opinion that the existing service by water other than through the Panama Canal is of advantage to the convenience and commerce of the people, extend the time during which such service by water may be operated beyond July 1, 1914.⁽⁴⁹⁾ (50) (51)

(49) Section 11 of the Panama Canal Act, also provides:

"In every case of such extension the rates, schedules, and practices of such water carrier shall be filed with the Interstate Commerce Commission and shall be subject to the act to regulate commerce and all amendments thereto in the same manner and to the same extent as is the railroad or other common carrier controlling such water carrier or interested in any manner in its operation.

"It will be observed that, under this wording of the law, the jurisdiction of the Interstate Commerce Commission extends over the rates, schedules, and practices of such carriers filed with the Commission. Apparently the intention of Congress was to bring the traffic of these carriers under the provisions of the act to regulate commerce in the same manner and to the same extent as is the traffic of the carriers controlling them. Under this assumption the controlled carrier would be subject to all the provisions of the act to regulate commerce, or, to state the matter in another way, the Commission would be charged with

(11) **Amendment of March 1, 1913.**⁽⁵²⁾ By the amendment of March 1, 1913, the Commission was required to value the property of all common carriers subject to the Act to Regulate Commerce, such valuation work to be begun within 60 days after the taking effect of the amend-

the duty of inquiring as to the management of the business in order to keep itself informed as to the manner in which the same is conducted and would have the right to compel the disclosure of full information as to the manner in which said carriers are conducting their business. It seems impossible that the Interstate Commerce Commission could perform the duties imposed upon it without having such information.

"From the foregoing, it will be seen that the Commission's jurisdiction under the act to regulate commerce, as amended by the Panama Canal act, extends:

"(1) To carriers by water when engaged in transportation handled partly by rail and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment;

"(2) To carriers by water or vessels when such carriers or vessels are under the control of a railroad or other common carrier with which they compete or may compete.

"This leaves carriers that are engaged in transportation wholly by water independent of regulation, so long as they are not controlled by other carriers."

I. C. C. Ann. Rep. 1912, pages 49, 50.

(50) "Under the Panama Canal Act, approved August 24, 1912, the president of the United States is authorized to fix the tolls to be charged for use of the canal. He may change them by giving six months' notice. The act provides that no tolls shall be levied upon vessels engaged in the coastwise trade of the United States. Vessels owned by railroads or by any company or person doing business in violation of anti-trust laws are excluded from the use of the canal.

"By a proclamation issued November 13, 1912, President Taft fixed the tolls to be paid by foreign shipping for passage through the Panama canal as follows:

"On merchant vessels carrying passengers or cargo, \$1.20 per net vessel ton—each 100 cubic feet—of actual earning capacity.

"On vessels in ballast without passengers or cargo, 40 per cent less than the rate of tolls for vessels with passengers or cargo.

"Upon naval vessels other than transports, colliers, hospital ships and supply ships, 50 cents per displacement ton.

"Upon army and navy transports, colliers, hospital ships and supply ships, \$1.20 per net ton, the vessels to be measured by the same rules as are employed to determining the net tonnage of merchant vessels.

(51) For full text of amendment of August 24, 1912, see Appendix I.

(52) 37 Stats. at Large, 701.

ment, and sessional reports made to Congress of the progress thereof.⁽⁵³⁾

(12) **Supplemental Act of October 15, 1914.**⁽⁵⁴⁾ The Act to Regulate Commerce was further amended and enforced by the enactment of the Clayton Anti-Trust Law of 1914, which divided the enforcement of its new powers between the Commission and other government regulating agencies.

While prosecutions arising from this practice have been against shippers only, there have been evidences that the laxness of the carriers in recognizing and paying false claims amounts, in effect, to the granting of rebates from the lawful rates. Evidence of this kind, tending to show that carriers as well as shippers are responsible for the filing and payment of excessive damage claims, was under review by the Interstate Commerce Commission.

These prosecutions, resulting from the investigations, indicate the volume of work handled before grand juries and in the courts. However, the larger part of the field investigations did not disclose violations of law. It is proper to state that in many instances investigations of complaints made by shippers and others against carriers disclosed that the complaint was groundless and that the carrier's practice was beyond criticism. Indeed, in one or two cases it was found that the carrier was not only complying with the law but that the very efficiency of its policing arrangements was the real reason for the complaint.

As to several other matters investigated, while the practice involved was found to be questionable, the subject was handled by correspondence or conference and the objectionable features thus eliminated. As the strict requirements of the law become more completely appre-

⁽⁵³⁾ For full text of amendment of March 1, 1913, see Appendix I.

⁽⁵⁴⁾ 38 Stats. at Large, 730.

ciated it may be anticipated that the number of cases in which questionable practices can be corrected by conference rather than prosecution will increase.⁽⁵⁵⁾

(13) **Amendment of March 4, 1915.**⁽⁵⁶⁾ The Cummins Amendment was an amendatory act passed on March 4, 1915, amending section 20, of the Act to Regulate Commerce, to prohibit common carriers subject to the Act limiting their common-law liability, not only as insurers against loss or damage to property received by them for transportation, but also as tortfeasors for loss or damage caused by their negligence.

Many widely varying or diametrically opposed ideas were expressed as to the effect of this amendment. Some looked upon the legislation as having the effect to automatically advance railroad freight rates ten per cent. The Commission on May 7, 1915, gave administrative expression to its views respecting this and certain other questions which may be found discussed under "Limitation of Liability," *post*.⁽⁵⁷⁾

(14) **Supplemental Act of August 9, 1916.**⁽⁵⁸⁾ The Bill of Lading Act, known as the Pomerene Bill, is a distinct enactment by the national legislature relating to bills of lading, but to the extent that its provisions affect the use of the bill of lading in interstate commerce, its effect is amendatory of the bill of lading provisions of the Act to Regulate Commerce.⁽⁵⁹⁾

(15) **Amendment of August 29, 1916.**⁽⁶⁰⁾ Congress re-

(55) For full text of amendment of October 15, 1914, see Appendix, Part IV.

(56) 38 Stats. at Large, 1197 became effective June 3, 1915.

(57) For full text of amendment of March 4, 1915, see Appendix, Part IV.

(58) Public No. 239, 64th Congress.

(59) For full text of amendment of August 9, 1916, see Appendix, Part IV.

(60) 39 Stats. at Large, 556.

amended the 1915 amendment of section 20, of the Act to Regulate Commerce, known as the "Cummins Amendment," specifically qualifying the several provisions of the amendment as to which serious questions of interpretation had arisen.⁽⁶¹⁾

The new statute regulating bills of lading became effective January 1, 1917.

⁽⁶¹⁾ For full text of Amendatory Act of August 29, 1916, see Appendix, Part IV.

CHAPTER III.

THE ACT TO REGULATE COMMERCE AS AMENDED.

- § 1. Jurisdiction and Scope of the Act—General.
- § 2. Creation of the Interstate Commerce Commission.

CHAPTER III.

THE ACT TO REGULATE COMMERCE AS AMENDED.

§ 1. Jurisdiction and Scope of the Act—General.

The Act to Regulate Commerce as originally passed in 1887, applied only to those carriers who were engaged in the transportation of persons or property, or both, **wholly by railroad or partly by railroad and partly by water** and to all such transportation and the agencies thereof not exclusively within the jurisdiction of the state government. It did not bring within the scope of the act transportation by means of teams and wagons or wholly by water, nor did it include as carriers certain special transportation agencies of ultra-modern nature.

It was plainly the intent of the act to apply to all the **interstate commerce** of the country conducted **by railroad transportation or by combined railroad and water transportation**. The scheme of regulation promulgated through the enactment sought not only to regulate such interstate commerce and the transportation agencies thereof, but to provide the necessary means for enforcing such regulation through the instrumentality of an administrative commission created by the act. The purpose of the act, the courts said, was "to secure just and reasonable charges for transportation; to prohibit unjust discrimination in the rendition of like services under similar conditions and circumstances; to prevent undue and unreasonable preferences to persons, corporations, or localities; to prohibit greater compensation for a shorter than for a longer dis-

tance of transportation over the same line; and to abolish combinations for the pooling of freights."

I. C. C. vs. Cincinnati, etc., 167 U. S. 479, 510.
I. C. C. vs. B. & O. R. R. Co., 145 U. S. 263.
U. S. vs. Mo. Pac. Ry. Co., 65 Fed. Rep. 903, 905.
I. C. C. vs. B. & O. R. R. Co., 43 Fed. Rep. 37.

In other words, the statute was designed by its framers to afford means for enforcing equal rights of shippers, equality and stability of rates, abolishment of favoritism among shippers, publication of rates, rules and regulations of the carriers subject to the act, and the inhibition of discriminatory practices, such as the allowing of rebates to shippers, undue preferences, etc. While the act neither enlarged nor curtailed the rights of the carriers at common law, it had for its objective the regulation of such carriers under then existing laws and the bringing of them back into their real character of public agencies affording equitable transportation treatment of the shippers. The broad public purpose of the legislation was to apply the regulatory provisions of the act to the country as a unit.

The operation of the inquisitorial and adjustive features of the act could only be set in motion by specific complaint against a direct injury to persons or industries or indirect injury to communities. Although the statute authorized and empowered the Interstate Commerce Commission, created by it, to prescribe maximum rates, it afforded no power in that body to establish general rate schedules, but left to the carriers the right to initiate their own rates, charges, rules, and regulations not in violence to any of the provisions of the act. It further qualified the exercise of this right by the carriers on a basis of equality. It in no way interfered with the common law right of the carriers to make contracts, nor did it prevent

competition or hamper the business of the carriers; on the contrary, it sought to facilitate commercial transportation within its jurisdiction and to encourage legitimate and open competition among the carriers.

The original act soon reached the courts and their analyses and constructions of its constitutional characteristics occupy the most prominent portions of the early history of the statute's administration. These judicial reviews of the act have an important bearing upon the constitutional power of Congress to enact the commerce law.

In the **Social Circle Case**, the Supreme Court of the United States, in speaking of the scope of the Act to Regulate Commerce, quoted from the B. & O. R. R. Co. case, as follows:—

“Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, that they shall not unjustly discriminate, so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at the common law, free to make special contracts looking to the increase of their business, to classifying their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted in other trades and pursuits.”

Social Circle Case, 162 U. S. 184.
U. S. vs. B. & O. R. R. Co., 43 Fed. Rep. 47.

The act “abrogated all executory contracts between shippers and carriers inconsistent with its provisions,” and it was held to be not contrary to the constitution in so doing.

Moore on Interest. Com., section 17, page 40.
K. & I. Br. Co. v. L. & N. R. Co., 1 I. C. C. Rep. 703, 715.

Fitzgerald vs. Fitzgerald & M. C. Co., 41 Neb. 374.
Haddock vs. D. L. & W. R. R. Co., 3 I. C. C. Rep. 302.

Even though the courts had pointedly indicated the necessity for the exercise of the federal regulation of the carriers before the passage of the Act to Regulate Commerce, in 1887, their subsequent construction of the act reflects subtle antagonism to the quasi-judicial powers conferred upon the Commission.

That the enactment of the statute was within the powers vested in Congress by the constitution was never doubted but in the early life of the Commission, it was necessary that construction should be given to the several sections of the Act by the Commission in its administrative enforcement of the provisions of the statute. The nature of the act as a whole was remedial and the Commission's earliest constructions were sufficiently broad and liberal to accomplish the purposes for which the statute was passed.

In the Express Companies Case, the Interstate Commerce Commission, speaking of the constructive analysis of the Act, said:—

“While this statute contains certain provisions for penalties, in the execution of which the courts will, no doubt, follow the recognized canons of construction, nevertheless the statute, as a whole, should be regarded as highly remedial in its purpose and scope. It was clearly designed to secure to the public equal and impartial rights and privileges, and to put an end to ancient and well-known abuses in the services rendered by common carriers. Such a statute should be construed liberally and fairly, of course, but always with the object in view of reaching as closely as possible the end proposed by the legislative intention, and making the beneficial result desired operative to its greatest available extent.”

In re Express Companies. 1 I. C. C. Rep. 677, 681.

The administrative experience of the Commission developed defects in the provisions of the Act in rendering ineffectual its control of contingencies and artifices not contemplated nor comprehended by the lawmakers at the time of its enactment.

The constructions of the Act by the Supreme Court of the United States and of the lower federal courts in reviewing and setting aside the orders of the Commission prior to 1906 had had the effect of rendering to a large degree ineffective the power of the Commission to enforce its orders and regulations. The Supreme Court had rendered ineffective the long-and-short-haul clause in the fourth section of the Act by holding that competition inherently prevented shippers from being situated under substantially similar conditions and circumstances. The Commission was thereby rendered powerless to prevent the miscarriage of many of its primary powers, and successive amendments have been necessary to give to the Act to Regulate Commerce its present superlative efficiency, the most important extensive supplementations of the Act being the enactments known as the Hepburn Act of 1906 and the Mann-Elkins Act of 1910.

The Supreme Court's interpretation of the powers of the Commission under the several sections of the Act was, in many instances, decidedly different from the construction and exercise of administrative powers as interpreted by the Commission itself. The court held the Commission to be without power to fix maximum or minimum rates for the future, despite the language of the Act, and the need for curative amending of the statute was constantly felt in the early years of the Commission's existence.

Social Circle Case, *supra*.

The general jurisdiction of the Act to Regulate Commerce, as amended, is national in character, relating to the interstate and foreign commerce of the country as a whole, but in its determination, the jurisdiction arises from the character of the transportation.

Prior to the amendment of 1906, the court had held that the jurisdiction of the Act to Regulate Commerce did not lie as to a state railroad "unless by common ownership or control, or by some agreement, it became a part of a line which did handle" interstate traffic, but since the Hepburn amendment the jurisdiction is determined by the character of the transportation itself rather than by any inter-carrier arrangement for its transportation.

The jurisdiction of the Act to Regulate Commerce, and its supplementary and amendatory acts, is not concurrent with the authority of Congress, as it does not extend to and include all forms of interstate transportation, such, for instance, as interstate transportation, wholly by water, or by vehicles or instrumentalities other than those enumerated in the first section of the statute, over which should Congress legislate, its constitutional authority is unquestioned.

An accurate analysis of the jurisdictional features of the interstate regulating system must of necessity be lengthy, and the many ramifications of the Commission's powers require subjugated treatment, which will be found in the subsequent sections on "Interstate Commerce Law."

Moore on Interstate Commerce, section 31, page 63.
Leonard vs. K. C. S. Ry. Co., 13 I. C. C. Rep. 573.

§ 2. Creation of the Interstate Commerce Commission.

Section 11 of the original Act to Regulate Commerce created a commission consisting of five commissioners to

be appointed by the President of the United States and concurred in by the Senate, to be known as the "Interstate Commerce Commission." The Commission was charged with the power and duty of administering the provisions of the Act to Regulate Commerce.

The principal office of the Commission was fixed at Washington, D. C., where its general sessions were to be held, but it was also authorized, when public convenience and economy required, to hold sessions in any part of the United States.

Under the provisions of the original Act, the salaries of the respective commissioners were fixed at \$7,500 per annum, but by the amendment of June 29, 1906 (Hepburn Law), the salaries were increased to \$10,000 a year and the membership of the Commission to seven.

For the legal nature of, executive and departmental organization of the Interstate Commerce Commission, see "Interstate Commerce Commission," Part IV, *post*.

CHAPTER IV.

THE ACT TO REGULATE COMMERCE AS AMENDED. (CONTINUED).

§ 1. Carriers and Kinds of Transportation Subject to the Act.

§ 2. Definition of Terms in the Act.

- (1) Term "Carrier" Defined.
- (2) Term "Common Carrier" Defined.
- (3) Term "Railroad" Defined.
- (4) Term "Transportation" Defined.
- (5) Term "Employees" Defined.
- (6) Term "Families" Defined.

§ 3. Detailed Description of Carriers Subject to the Act.

CHAPTER IV.

THE ACT TO REGULATE COMMERCE AS AMENDED. (CONTINUED).

§ 1. Carriers and Kinds of Transportation Subject to the Act.

The jurisdiction of the Act to Regulate Commerce, as amended, extends over and includes the following abstract description of carriers and transportation:

(a) Any corporation, person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water;

(b) Telegraph, telephone and cable companies, whether wire or wireless, engaged in sending messages;

(c) Any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management or arrangement for a continuous carriage or shipment; from one state or territory of the United States or the District of Columbia to any other state or territory of the United States or the District of Columbia, or from one place in a territory to another place in the same territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States;

The transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry in the United States or an adjacent foreign country.

§ 2. Definition of Terms in the Act.

The Act contains definitions of certain terms the meanings of which are of particular significance in the descriptive jurisdiction of the regulatory laws.

(1) **Term "Carrier" Defined.** The use of the word "carrier" in the Act is defined to mean "common carrier."

(2) **Term "Common Carrier" Defined.** The common-law definition of the term "common carrier" is not given in the words of the Act, but the term is nevertheless subject to such common-law definition, and as now used in the Act includes express companies and sleeping car companies.

Tap Line Cases, 234 U. S. 1.

(3) **Term "Railroad" Defined.** The term "railroad," as used in the Act, is defined by the statute to include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated in the Act, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property.

(4) **Term "Transportation" Defined.** The term "trans-

portation," as used in the Act, is defined by the statute to include cars and other vehicles and all instrumentalities and facilities of shipment or carriage irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported.

(5) **Term "Employees" Defined.** The term "employees," as used in the Act, is defined by the statute to include furloughed, pensioned, and superannuated employees, persons who have become disabled or infirm in the service of any common carrier subject to the Act, and the remains of a person killed in the employment of such a carrier and ex-employees traveling for the purpose of entering the service of any such common carrier.

(6) **Term "Families" Defined.** The term "families," as used in the Act, is defined by the statute to include the families of those persons named in the proviso in the Act relating to free transportation, and also the families of persons killed, and the widows during widowhood and minor children during minority of persons who died in the service of any common carrier subject to the Act.

Act to Regulate Commerce, section 1.

§ 3. Detailed Description of Carriers Subject to the Act.

The basis of jurisdiction of the Act to Regulate Commerce over common carriers is functional. The description of such transportation entities in the language of the statute is in the abstract.

Categorically, the following transportation agencies, when engaged either wholly or partly in interstate com-

merce, are within the jurisdiction of the Act to Regulate Commerce and its amendatory and supplemental acts:

- Belt railroads.
- Bridges and bridge companies.
- Cable companies.
- Car ferries.
- Express companies.
- Fast freight lines.
- Ferries and ferry companies.
- Foreign railroads.
- Inland water carriers.
- Interstate steam railroads.
- Interstate electric railroads.
- Interstate street railways.
- Intraterritorial common carriers.
- Lighters and lighterage companies.
- Ocean carriers.
- Pipe lines and pipe line companies.
- Private car companies.
- Purchasers of common carriers subject to the Act.
- Receivers of common carriers subject to the Act.
- Sleeping car companies.
- State railroads (steam or electric).
- Successors of common carriers subject to the Act.
- Telegraph companies.
- Telephone companies.
- Terminal and belt railroads.
- Trustee of common carriers subject to the Act.

CHAPTER V.

THE ACT TO REGULATE COMMERCE AS AMENDED. (CONTINUED).

Amplification of Sections.

- § 1. Statutory Provisions of Section 1, as Amended.
- § 2. Kinds of Carriers Subject to the Act.
 - (1) Pipe Lines.
- § 3. Telegraph, Telephone and Cable Companies.
- § 4. Common Carriers by Railroad and by Railroad and Water.
- § 5. Jurisdictional Status of Common Carriers in General.
- § 6. Common Law Definition of a Common Carrier.
- § 7. Common Law Obligations and Rights of Common Carriers not Abrogated by the Act.
- § 8. Incorporation of Common Carrier not full Test of Jurisdiction.
- § 9. Effect of Incorporation of Common Carrier.
- § 10. Carriers not Subject to the Act.
- § 11. Jurisdiction of Act over State Common Carriers.
- § 12. Common Arrangement Between Carriers.
- § 13. Interstate Commerce Commission on "Common Arrangement" prior to Amendment of 1906.
- § 14. Through Bill of Lading not Necessary to Constitute "Common Arrangement," (Prior to 1906.)
- § 15. Foreign Carriers.
- § 16. Rail and Water Carriers.
- § 17. Carriers Transporting Express Matter.
- § 18. Bridges and Bridge Companies.
- § 19. Relation of Carrier Operating over Bridge with Bridge Company.
- § 20. Bridges Connecting two States.
- § 21. Bridges Included in Term "Railroad."
- § 22. Bridges as Part of Carrier's Line.
- § 23. Bridges not Common Carriers.
- § 24. Cable Companies as Common Carriers.
- § 25. Fast Freight Lines as Common Carriers.
- § 26. Express Companies as Common Carriers.
- § 27. Car Ferries as Common Carriers.
 - (1) Car Ferries.
 - (2) Municipal Ferries.

- § 28. Foreign Railroads as Common Carriers.
- § 29. Inland Water Carriers.
- § 30. Interstate Railroads.
- § 31. Electric Street Railways.
- § 32. Intraterritorial Common Carriers.
 - (1) Common Carriers in Alaska.
 - (2) Common Carriers in Porto Rico.
 - (3) Common Carriers in Hawaii.
 - (4) Common Carriers in Philippine Islands.
 - (5) Common Carriers in the Panama Canal Zone.
- § 33. Lighters and Lighterage Companies.
- § 34. Ocean Carriers.
- § 35. Private Car Companies.
- § 36. Purchasers and Successors of Common Carriers.
- § 37. Trustees and Receivers of Common Carriers.
- § 38. Lessees of Common Carriers.
- § 39. Sleeping Car Companies.
- § 40. State Railroads Engaged in Interstate Transportation.
 - (1) Rulings Respecting State Carriers prior to the 1906 Amendment of the Act to Regulate Commerce.
- § 41. Street Railways within the District of Columbia.
- § 42. Terminal and Belt Railroads Engaged in Handling Interstate Traffic.
 - (1) Industrial Railways.
 - (2) Tap Lines.
 - (3) Plant Facilities.
- § 43. Jurisdiction of the Commission not Affected by Nature of Organization of Carrier.
- § 44. Kinds of Transportation Subject to the Act.
- § 45. Movement in Transportation Conclusive.
- § 46. Difference between Interstate Carriers and Interstate Transportation.
- § 47. Interstate and Foreign Commerce Subject to Act.
- § 48. Transportation of Foreign Traffic Between the United States and Adjacent Foreign Country.
- § 49. Statutory Provisions relating to Transportation to Ports of Transshipment.
- § 50. Statutory Provisions relating to Transportation of Foreign Traffic from a Foreign Country to a Point in the United States.
- § 51. When Act to Regulate Commerce Abrogates State Statute.
- § 52. "Interstate Commerce"—What Constitutes.
- § 53. Character of Transportation Determined by Contract of Shipment.
- § 54. Character of Transportation Controls, Not Shipper's Intent.

- § 55. "Common Arrangement" Clause not Applicable to All-Rail Transportation.
- § 56. Effect of Temporary Stoppage in Transit.
- § 57. Intraterritorial Transportation.
- § 58. Rail-and-Water Transportation.

CHAPTER V.

THE ACT TO REGULATE COMMERCE AS AMENDED. (CONTINUED).

Amplification of Sections.

§ 1. Statutory Provisions of Section 1, as Amended.

(As amended June 29, 1906, April 13, 1903, and June 18, 1910.)

Carriers and
transportation
subject to the
Act.

"That the provisions of this Act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, and to telegraph, telephone, and cable companies (whether wire or wireless) engaged in sending messages from one State, Territory, or District of the United States, or to any other State, Territory, or District of the United States, or to any foreign country, who shall be considered and held to be common carriers within the meaning and purpose of this Act, and to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment), from one State or Territory of the United States or the District of Columbia, to any other State or Territory of the United States or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the trans-

Telegraph, tele-
phone, and ca-
ble companies.

Railroads and
water lines.

portation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country: **Provided, however,** That the provisions of this Act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid, nor shall they apply to the transmission of messages by telephone, telegraph, or cable wholly within one State and not transmitted to or from a foreign country from or to any State or Territory as aforesaid.

"The term 'common carrier' as used in this Act, shall include express companies and sleeping car companies. The term 'railroad' as used in this Act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property; and the term 'transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor, and

Act does not apply to transportation wholly within one state.

Express companies and sleeping car companies included. What the term "railroad" includes.

What the term "transportation" includes.

to establish through routes and just and reasonable rates applicable thereto; and to provide reasonable facilities for operating such through routes and to make reasonable rules and regulations with respect to the exchange, interchange, and return of cars used therein, and for the operation of such through routes, and providing for reasonable compensation to those entitled thereto.

"All charges made for any service rendered or to be rendered in the transportation of passengers or property and for the transmission of messages by telegraph, telephone, or cable, as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful: Provided, That messages by telegraph, telephone, or cable, subject to the provisions of this Act, may be classified into day, night, repeated, unrepeatd, letter, commercial, press, Government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages: And provided further, That nothing in this Act shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers, for the exchange of services.

Charges must be just and reasonable.

"And it is hereby made the duty of all common carriers subject to the provisions of this Act to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting,

Classifications, regulations, and practices must be just and reasonable.

storing, and delivery of property subject to the provisions of this Act which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this Act upon just and reasonable terms, and every such unjust and unreasonable classification, regulation, and practice with reference to commerce between the States and with foreign countries is prohibited and declared to be unlawful.

Free passes and
free transportation
prohibited.

Excepted classes.

"No common carrier subject to the provisions of this Act shall, after January first, nineteen hundred and seven, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees and their families, its officers, agents, surgeons, physicians, and attorneys at law; to ministers of religion, traveling secretaries of railroad Young Men's Christian Associations, inmates of hospitals and charitable and eleemosynary institutions, and persons exclusively engaged in charitable and eleemosynary work; to indigent, destitute, and homeless persons, and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Homes, including those about to enter and those returning home after discharge; to necessary care takers of live stock, poultry, milk, and fruit; to employees on sleeping cars, express cars, and to linemen of telegraph and telephone companies; to Railway Mail Service employees, post-office inspectors, custom inspectors, and immigration inspectors; to newsboys on trains, baggage agents, witnesses attending any legal investigation in which the common carrier is interested, persons injured in wrecks and physicians and nurses attending such persons: **Provided,** That this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers, and their

Interchange of
passes author-
ized.

families; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation: **And provided further, That this provision shall not be construed to prohibit the privilege of passes or franks, or the exchange thereof with each other, for the officers, agents, employees, and their families of such telegraph, telephone, and cable lines, and the officers, agents, employees, and their families of other common carriers subject to the provisions of this Act: Provided further, That the term 'employees' as used in this paragraph shall include furloughed, pensioned, and superannuated employees, persons who have become disabled or infirm in the service of any such common carrier, and the remains of a person killed in the employment of a carrier and ex-employees traveling for the purpose of entering the service of any such common carrier; and the term 'families' as used in this paragraph shall include the families of those persons named in this proviso, also the families of persons killed, and the widows during widowhood and minor children during minority of persons who died, while in the service of any such common carrier. Any common carrier violating this provision shall be deemed guilty of a misdemeanor, and for each offense, on conviction, shall pay to the United States a penalty of not less than one hundred dollars nor more than two thousand dollars, and any person, other than the persons excepted in the provision, who uses any such interstate free ticket, free pass, or free transportation shall be subject to a like penalty. Jurisdiction of offenses under this provision shall be the same as that provided for offenses in an Act entitled, 'An Act to further regulate commerce with foreign nations and among the States,' approved February nineteenth, nineteen hundred and three, and any amendment thereof.**

"From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company

What term "employees" and "families" include.

Jurisdiction and penalty for violation.

Commodities clause.

to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier.

"Any common carrier subject to the provisions of this Act, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper **or owner of such lateral, branch line of railroad**, such shipper **or owner of such lateral, branch line of railroad** may make complaint to the Commission, as provided in section thirteen of this Act, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the Commission may make an order, as provided in section fifteen of this Act, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the

Carriers' duty to
construct switch
connections.

Switch connec-
tions may be
ordered by the
Commission.

enforcement of all other orders by the Commission. other than orders for the payment of money."

§ 2. Kinds of Carriers Subject to the Act.

Since the character of the transportation is the real interstate jurisdictional test rather than the corporate, physical, or other status of the carrier, the subsequent classification of the various kinds of carriers subject to the Act is preliminary to a more searching jurisdictional test of the functions performed by the several types of transportation agencies in the carriage of interstate traffic.

(1) **Pipe Lines.** The Act provides in section 1 that it shall apply to "any corporation, person or persons, engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water.

Act to Regulate Commerce, section 1.

A pipe line is defined in the law dictionary to be a connected series of pipes for the transportation of oil, gas, or water. And again, as a line of pipes running upon or in the earth carrying with it the right to the use of the soil in which it is placed.

Bouvier's Law Dictionary, subj., "Pipe Lines."
Dietz vs. Mission Trans. Co., 95 Cal. 92, 30 Pac. Rep. 380.

A pipe line company for conveying oils is a common carrier, bound to receive and transport for all persons alike, all goods entrusted to its care, and is not in any sense, or at any time, an agent for the person committing oil to its care:

Griffin vs. S. W. Pa. Pipe Lines, 33 Atl. Rep. 578.
Columbia Conduit Co. vs. Com., 90 Pa. 307.

In the Matter of Pipe Lines, 24 I. C. C. Rep. 1, the Commission declared that the Act to Regulate Commerce impressed the obligations of a common carrier upon a pipe line engaged in the transportation of oil in interstate commerce, even though such pipe line was built over its privately acquired right-of-way, and transported only its own oil. Such traffic is not divested of its interstate character by the placing of the ownership of the pipe line in a different corporation in each state through which the transportation is performed and by transferring the title to the oil to each of such corporations contemporaneously with the entrance of the oil into the pipes of that corporation at the state line.

However, the utilization by a pipe line of the right-of-way of a common carrier railroad does not impress upon that pipe line the obligations of a common carrier, nor is a pipe line impressed with the obligations of a common carrier merely because, by arrangement with the abutting owner, it uses a public highway for right-of-way purposes.

The transfer by a common carrier pipe line to a private corporation of a portion of its property theretofore used in its common carrier operations, but not located in the state wherein it was incorporated as a common carrier, can not effect a release of the property from the obligations of a common carrier.

The Commission held that the transportation by the New York Transit Co., in New Jersey, and by the National Transit Co., in New Jersey and Maryland, prior to November 1, 1905, was transportation by these corporations as common carriers.

In this case the Commission declined to pass upon a Kansas statute making pipe lines common carriers, merely holding that as to the phases of the federal statute which

are ineffective, a similar state enactment must also be ineffective.⁽¹⁾

Thus an oil company owning a common carrier pipe line which actually did, or which might, compete with its own steamers, was held to bring such a situation within the scope of the Panama Canal Act.

S. P. Ownership of Oil Steamers, 34 I. C. C. Rep. 77, 82.

See in this connection the status of common carriership applied to tap lines by the Supreme Court in this chapter, *post*.

§ 3. Telegraph, Telephone, and Cable Companies.

Whether wire or wireless, a telegraph, telephone, or cable, company, engaged in sending messages from one state, territory, or district of the United States, to any other state, territory, or district of the United States or to any foreign country, is within the jurisdiction of the Act.

Act to Regulate Commerce, section 1.

Telegraph, Telephone and Cable companies were not subject to the Act prior to the amendment of June 18, 1910.

A telephone, telegraph, or cable company is a public

⁽¹⁾ The Commission, in the proceeding referred to, declared the following pipe lines to be common carriers within the jurisdiction of the Act to Regulate Commerce:

Oklahoma Pipe Line Co.
Prairie Oil & Gas Co.
Standard Oil Co. of Louisiana.
Ohio Oil Co.
Standard Oil Co. of New Jersey.
Tidewater Pipe Line Co., Ltd.
Producers' & Refiners' Oil Co., Ltd.
United States Pipe Line Co.
Pure Oil Co.
Pure Oil Pipe Line Co.
National Pipe Line Co.
Uncle Sam Oil Co.
Uncle Sam Oil Co. of Kansas.

servant, and subject to the provisions of the amended Act forbidding undue preference or unjust discrimination

Barnes, Interstate Commerce, sections 37, 38, 39.

The character of the transportation service is also the interstate jurisdictional test as to telegraph, telephone, or cable companies. It has been held that telegraphic and telephonic intercourse and communication between points in different states constitute interstate commerce, and a state telegraph or telephone company which transmits interstate messages is within the jurisdiction of the Act.

I. C. C. Confr. Rulings, Bulletin No. 6, Ruling No. 305 (compare Ruling No. 291).

Local Commercial Telephone Service in Pittsburgh, Pa., 27 I. C. C. Rep. 622, 624.

Shoemaker vs. C. & P. Telephone Co., 20 I. C. C. Rep. 614, 621.

W. U. Tel. Co. vs. Pendleton, 122 U. S. 356.

Muskogee Nat. Tel. Co. vs. Hall, 118 Fed. Rep. 382.

Sunset Tel. & Tel. Co. vs. Eureka, 172 Fed. Rep. 755.

Re Penn. Tel. Co., 48 N. J. Eq. 91.

N. W. Tel. Co. vs. Chicago, 76 Minn. 334.

Legal logic of Social Circle Case, *supra*.

See also:

Malone vs. N. Y. Telephone Co., 40 I. C. C. Rep. 185.

No jurisdiction lies in the Act over telegraph or telephone companies, or cable lines, as to their business operated solely within the District of Columbia, such authority being vested in the Public Utilities Commission of the District of Columbia. But all telephone, telegraph, or cable companies transmitting interstate messages or communications must conform to the provisions of the Act the same as other common carriers subject thereto.

Act to Regulate Commerce, section 1.

§ 4. Common Carriers by Railroad and by Railroad and Water.

Any common carrier or carriers engaged in the transportation of passengers or property wholly by **railroad**, or partly by **railroad** and partly by **water** when both are used under a common control, management, or arrangement for a continuous carriage or shipment, come within the jurisdiction of the Act.

Act to Regulate Commerce, section 1.

§ 5. Jurisdictional Status of Common Carriers in General.

All common carriers enumerated in the provisions of the Act, engaged in the transportation between points in different states of interstate commerce, as defined in the Act, inclusive of such common carriers engaged in such transportation between a point in the United States and an adjacent foreign country, between points in the United States and ports of transshipment or entry therein, and between points in the same state when part of the transportation passes through another state, are within the jurisdiction of the Act to the extent so engaged. By specie, such common carriers are steam railroads, electric railroads, pipe lines (except for water and artificial or natural gas), express companies, sleeping car companies, boat lines (when used under arrangement for through carriage with railroads), telegraph, telephone, and cable companies.

Rates in Chicago Switching District, 34 I. C. C. Rep. 234, 237, 238.

A. T. & S. F. R. Co. vs. K. C. Stockyards Co., 33 I. C. C. Rep. 92, 98, 100.

Campbell's Creek Coal Co. vs. A. A. R. R. Co., 33 I. C. C. Rep. 558, 560.

Stone's Express vs. B. & M. R. R. Co., 33 I. C. C. Rep. 638, 641.

Joint Rates with Birmingham Southern R. R. Co., 32 I. C. C. Rep. 110, 120.

- Industrial Railways Case, 32 I. C. C. Rep. 129, 133.
 Eastern Shore Dev. & S. S. Co. vs. B. & O. R. R. Co., 32 I. C. C. Rep. 238, 242.
 N. Y. Dock Ry. vs. B. & O. R. R. Co., 32 I. C. C. Rep. 568, 573, 574.
 Application of S. P. Co. in re operation of S. S. Co., 32 I. C. C. Rep. 690, 695.
 Decatur Nav. Co. vs. L. & N. R. R. Co., 31 I. C. C. Rep. 281, 285.
 Five Per Cent Case, 31 I. C. C. Rep. 351, 357.
 Flour City S. S. Co. vs. L. V. R. R. Co., 24 I. C. C. Rep. 179, 185.
 In re Cancellation of Joint Rates on Coal on the C. Z. & G. R. R. Co., 27 I. C. C. Rep. 353, 362.
 Kansas City, etc., vs. K. C. V. & T. Co., 24 I. C. C. Rep. 22, 25.
 Anton Piano Co. vs. C. M. & St. P. Ry. Co., 139 N. W. Rep. 743, 745 (Wis.).
 The Tap Line Case, 23 I. C. C. Rep. 277, 291, 292.
 In re Wharfage Charges, etc., 23 I. C. C. Rep. 535, 544.
 Gulf Coast Nav. Co. vs. K. C. S. Ry. Co., 19 I. C. C. Rep. 544.

It should be noted, in this connection, that the functional test of the carrier as a jurisdictional determinant, while seemingly plainly stated in the language of the Act itself, has been flexed by the liberal interpretation given to the status-test by the Supreme Court in the Tap Line cases. The Interstate Commerce Commission had applied the test of service and ownership in determining the status of tap lines, but the Supreme Court declared such a conclusion lost sight of the principle, that the extent to which a railroad is in fact used does not determine the fact whether it is or is not a common carrier. It is the extent to which a railroad may be used as a matter of right—"the right of the public to use the road's facilities and to demand service of it rather than the extent of its business"—which is the real criterion determinative of its character.

§ 6. Common Law Definition of a Common Carrier.

At common law, a common carrier is one who undertakes as a business to carry and transport from one place to another, for hire, the goods of all persons who might apply for such carriage, provided the goods are of the kind which he professes to carry, and the persons so applying will agree to have them carried upon the terms prescribed by the carrier.

Elliott on Railroads, volume IV, section 1391, et seq.
2 Am. & Eng. Encyl. of Law, title, "Carriers."
Redfield on "Railway Carriers," 1.
Hutchinson on "Carriers," section 47.

And this is essentially an acceptable definition of a common carrier at the present time, although the conditions of carriage which the carrier may now prescribe must be consonant with the regulatory laws. The test of status of a common carrier now is the character of service which it renders or holds itself out as willing to render, and which the public may demand of it.

Stonega Coke & Coal Co. vs. L. & N. R. R. Co., 23 I. C. C. Rep. 17.
Tap Line Cases, 234 U. S. 1.

Compare:

Tap Line Case, 23 I. C. C. Rep. 277, 291, 292, and 23 I. C. C. Rep. 549.

Hence, a common carrier, under the more modern acceptance of the term, is one who holds himself out as ready to engage in the transportation for hire as a public employment, and, in general, the liability of a common carrier does not attach to one who does not so hold himself out.

Kansas City vs. K. C. V. & T. Ry. Co., 24 I. C. C. Rep. 22, 25.

§ 7. Common Law Obligations and Rights of Common Carriers Not Abrogated by the Act.

The Act to Regulate Commerce does not abridge or take away the right of the common carrier, at common law, to make contracts or adopt proper business methods for the conduct of its business. Fundamentally the statute reaffirms the common law rules governing common carriers insofar as they pertain to and govern the transportation of interstate commerce, but vests in the Interstate Commerce Commission an administrative supervision of the carriers to the end that the lines of interstate carriers shall form a national system of public highways, the use of which may not be restricted by carriers in their own interests regardless of the rights of shippers.

I. C. C. vs. L. & N. R. R. Co., 73 Fed. Rep. 409.
Memphis Hay & Grain Assn. vs. St. L. & S. F. R. R. Co.,
24 I. C. C. Rep. 609, 615.

At common law it is the duty of a common carrier to transport persons and property at reasonable rates.

Tift vs. So. Ry. Co., 123 Fed. Rep. 789.

This principle, predicated as it is upon the quasi public nature of common carriers of persons and property for the public, was given voice to in the opinion of the Supreme Court in the Abilene case, where it was judicially declared:

“Without going into detail, it may not be doubted that at common law, where a carrier refused to receive goods offered for carriage except upon the payment of an unreasonable sum, the shipper had a right of action in damages. It is also beyond controversy that when a carrier accepted goods without payment of the cost of carriage or an agreement as to the price to be paid, and made an unreasonable exaction as a condition of the delivery of the goods, an action could

be maintained to recover the excess over a reasonable charge. And it may further be conceded that it is now settled that even where, on the receipt of goods by a carrier, an exorbitant charge is stated, and the same is coercively exacted either in advance or at the completion of the service, an action may be maintained to recover the overcharge. 2 Kent, Comm. 599, and note A; 2 Smith Lead. Cas., part 1, 8th Ed., Hare & Wallace Notes, page 457.

Texas & Pacific Ry. Co. vs. Abilene Cotton Oil Co., 204 U. S. 426.
Penn. R. R. Co. vs. Preston, 237 U. S. 121.

The common law condemned unjust discrimination and favored equality in the treatment of shippers under like conditions, and we find the Act to Regulate Commerce but adding concrete administrative force to the already existing principle of law.

The right of the public to regulate common carriers in the performance of their duties and obligations has long been recognized by the courts, which early in the history of our transportation era gave utterance to the doctrine that he who devotes his property to a use in which the public has an interest, in effect, grants to the public an interest in that use.

Munn vs. Illinois, 94 U. S. 113.

§ 8. Incorporation of Common Carrier Not Full Test of Jurisdiction.

Any carrier, whether incorporated under the laws of a foreign country or a federal or state charter, when engaged in the transportation of interstate commerce defined in the Act, is subject to the jurisdiction of the Act within the confines of the United States.

10 I. C. C. Rep. 217.
4 I. C. C. Rep. 447, 3 I. C. Rep. 417.
3 I. C. C. Rep. 89, 2 I. C. Rep. 497.

§ 9. Effect of Incorporation of Common Carrier.

So far as interstate transportation as defined in the Act is concerned, incorporation is not a condition precedent to the right to be a common carrier by rail. It is the character of the service which a carrier renders or holds itself out as willing to render and that the public may demand of it, as a matter of right, that is controlling in determining whether it is a common carrier.

Truckers' Transfer Co. vs. C. & W. C. Ry. Co., 27 I. C. C. Rep. 275, 277.

Tap Line Cases, 234 U. S. 1.

Tap Line Case, 31 I. C. C. Rep. 490.

Stonega Coke & Coal Co. vs. L. & N. R. R. Co., 23 I. C. C. Rep. 17.

Compare:

Tap Line Cases, 23 I. C. C. Rep. 275, 277, and 23 I. C. C. Rep. 549.

§ 10. Carriers Not Subject to the Act.

The canons of statutory construction call for strict adherence to the legislative intent, and there may not be read into the Act, by implication, a jurisdiction over carriers not definitely brought within its scope of authority by its terms. Not all carriers are subject to the authority of the Act. Carriers, even of the physical and legal nature described in the Act, not engaged in the transportation of passengers or property as defined therein and under the conditions established, are not within the jurisdiction of the regulatory statute. The test of service excludes certain carriers under **certain** conditions and other carriers under **all** conditions. Thus, water carriers, unless participating in the transportation of interstate commerce under a common control, management, or arrangement with a rail carrier, are not within the jurisdiction of the Act; nor

are wagon carriers; nor state railroads not engaged in interstate transportation.

Act to Regulate Commerce section 1.

§ 11. Jurisdiction of Act Over State Common Carriers.

A carrier whose line is situated wholly within a state, but which participates in a carriage of shipments originating at, or destined for, points in other states, is subject to the Act.

The jurisdiction of the Act attaches to state common carriers whenever such carriers engage in interstate commerce as defined in the Act. Thus, the transportation of a shipment from a point in one state to a point in another state, over lines of a state and an interstate carrier as a continuous line, becomes subject to the Act by reason of the fact that having entered into a common arrangement for the through carriage of goods, a new line of transportation has been formed independent of its constituent elements, which included among its number a state railroad.

The syllabus of the decision of the Supreme Court involving this holding is as follows:

“When a state railroad company whose road lies within the limits of the state enters into the carriage of foreign freight by agreeing to receive the goods by virtue of foreign through bills of lading, and to participate in through rates and charges, and thereby becomes part of a continuous line, not made by a consolidation with the foreign companies, but by an arrangement for the continuous carriage or shipment from one state to another, and thus becomes amenable to the Federal Act in respect to such interstate commerce; and, having thus subjected itself to the control of the Interstate Commerce Commission, it cannot limit that control in respect to foreign traffic to certain points on its road to the exclusion of other points.

"When goods shipped under a through bill of lading; or in any other way indicating a common control, management, or arrangement from a point in one state to a point in another state are received in transit by a state common carrier, such carrier, if a railroad company, must be deemed to have subjected its road to an arrangement for a continuous carriage or shipment within the meaning of the Act to Regulate Commerce."

C. N. O. & T. P. Ry. Co. vs. I. C. C., 162 U. S. 184.

See also:

Jurisdiction over Water Carriers, 15 I. C. C. Rep. 205, 207.

Augusta, etc., R. Co. vs. Wrightsville R. R., 74 Fed. Rep. 533.

§ 12. Common Arrangement Between Carriers.

Originally the test of common arrangement between carriers, within the meaning of the terms of the Act, was the successive receipt and forwarding in ordinary course of business by two or more carriers of interstate shipments under through bills of lading for continuous carriage over their lines, without previous express agreement between such carriers. Previous express agreement between such carriers is not necessary to bring such transportation within the scope of the Act.

Railroad Commission of Georgia vs. Clyde S. S. Co., 5 I. C. C. Rep. 324, 4 I. C. Rep. 120.

Thus, where a state common carrier accepted and transported interstate traffic under through bills of lading, it was held to have subjected its line to a "common control, management, or arrangement for a continuous carriage or shipment" within the meaning of the Act, although such

state carrier charged its full local rates for the service performed by it.

- Pa. Millers', etc., Assn. vs. P. & R. Ry. Co., 8 I. C. C. Rep. 531.
Bost. Fruit & Prod. Exchange vs. N. Y. & N. E. R. R. Co., 4 I. C. C. Rep. 664.
Freight Bureau of Cincinnati vs. C. N. O. & T. P. Ry. Co., 6 I. C. C. Rep. 195, 4 I. C. Rep. 592.
Railroad Commission of Florida vs. S. F. & W. Ry. Co., 5 I. C. C. Rep. 13.
T. & P. Ry. Co. vs. Clark, 4 Tex. Civ. App. 611, 23 S. W. Rep. 698.
Phelps & Co. vs. T. & P. Ry. Co., 6 I. C. C. 36, 4 I. C. Rep. 44.
U. S. vs. Standard Oil Co., 155 Fed. Rep. 305.
U. S. vs. Seaboard Ry. Co., 82 Fed. Rep. 563.
U. S. vs. N. Y. C. & H. R. R. Co., 146 Fed. Rep. 298.
Interstate Stock Yards Co. vs. Indianapolis U. Ry., 99 Fed. Rep. 472.

See also, this volume, chapter V, section 40, "State Railroads Engaged in Interstate Transportation," post.

The Supreme Court, in C. N. O. & T. P. Ry. Co. vs. I. C. C., 162 U. S. 184, said:

"All we wish to be understood to hold is that when goods shipped under a through bill of lading from a point in one state to a point in another are received in transit by a state common carrier, under a conventional division of the charges, such carrier must be deemed to have subjected its road to an arrangement for a continuous carriage or shipment within the meaning of the Act to Regulate Commerce."

This ruling of the Supreme Court upheld the ruling of the majority of the Commission in the matter of Jurisdiction over Water Carriers, 15 I. C. C. Rep. 205, where it was held that a shipper may not use a carrier subject to the Act, or its agent, as his agent for the purpose of receiving consignments of property and rebilling the same in order to break an interstate journey or make an intrastate one, the Commission's authority being confined to

the carriers subject to the Act and until a carrier becomes subject to the Act voluntarily or as a matter of law, the Commission's rule as to a shipper availing himself of the services of such carrier as his agent, does not apply.

In re Transportation by the C. & O. Ry., 21 I. C. C. Rep. 207, 209.

This earlier rule has been since modified to conform with the more liberal construction being given to the Act as a whole. The test of subjection to the Act is now one of through routing, and, irrespective of what control, management, or arrangement may exist between carriers, when such carriers accept and undertake the movement of an interstate shipment for continuous carriage over their lines, the movement of and charges for such shipments become a unit and express agreement for a through rate is not required; the character of the service undertaken by the constituent lines in the continuous movement of a through shipment brings such carriers and transportation within the authority of the Act.

204 U. S. 403.

C. N. O. & T. P. Ry. vs. I. C. C., 162 U. S. 184.

In the Matter of Transportation by C. & O. Ry. Co., 21 I. C. C. Rep. 207, 209.

See Kanotex Case ruling in last preceding section.

See also:

Moore on Interstate Commerce, sections 29, 61.

Troy Bd. of Trade vs. A. M. R. R. Co., 6 I. C. C. Rep. 1.

Daniels vs. Chicago, R. I. & P. Ry. Co., 6 I. C. C. Rep. 458.

Trammell vs. Clyde S. S. Co., 5 I. C. C. Rep. 324.

181 U. S. 29.

§ 13. Interstate Commerce Commission on "Common Arrangement" Prior to Amendment of 1906.

Prior to the amendment of 1906, the test of a "common arrangement" within the meaning of the Act, was the

receipt and delivery of through shipments between different carriers. There need not be a control of a through line centered in a single source of authority, but the "arrangement" for continuous carriage or shipment is complete whenever the carriers have arranged for receipt and delivery of through traffic to and from each other and such an arrangement is necessarily "common."

- Trammell vs. Clyde S. S. Co., 5 I. C. C. Rep. 324.
James, etc., Co. vs. Cincinnati, etc., R. R. Co., 4 I. C. C. Rep. 744.
Mattingly vs. Pa. R. Co., 3 I. C. C. Rep. 592.
Pa. Millers' Assn. vs. Phila. R. Ry. Co., 8 I. C. C. Rep. 531, 549.
Gustin vs. A. T. & S. F. R. R. Co., 8 I. C. C. Rep. 277.
Cincinnati Frt. Bu. vs. Cinn., etc., R. R. Co., 6 I. C. C. Rep. 195, 233.
U. S. vs. Standard Oil Co. of Indiana, 155 Fed. Rep. 305.
I. C. C. vs. Detroit, G. H. & M. Ry. Co., 167 U. S. 633.
Cinn. N. O. & T. P. Ry. Co. vs. I. C. C., 162 U. S. 184.
Daniel Ball vs. C. S., 10 Wall. (U. S.) 565, 19 L. Ed. 1002.
In re Transportation by C. & O. Ry. Co. et al., 21 I. C. C. Rep. 207.

§ 14. Through Bill of Lading Not Necessary to Constitute "Common Arrangement" (Prior to 1906).

A through bill of lading was held, prior to the amendment of 1906, not essential to a "common arrangement" between carriers engaged in transporting interstate shipments, nor was it necessary that there should be an express agreement respecting such transportation entered into by the constituent carriers in the line of movement.

- U. S. vs. Seaboard Ry. 82 Fed. Rep. 563.
Boston Fruit Exchange vs. N. Y. C. & H. R. R. Co., 4 I. C. C. Rep. 654.
Moore on Interstate Commerce, section 34, page 66.

For subsequent modification of the rule respecting "common control, management, and arrangement," see

this volume, chapter V, section 44, "Kinds of Transportation Subject to the Act."

§ 15. Foreign Carriers.

The jurisdiction of the Act to Regulate Commerce extends to and includes shipments actually moving in foreign commerce as to that part of the transportation which is through the United States, irrespective of whether such shipments are interstate.

- T. & P. Ry. Co. vs. R. R. Com. of La. 183 Fed. Rep. 1005, 1007.
 Aransas Pass Channel & Dock Co. vs. G. H. & S. A. Ry. Co.,
 27 I. C. C. Rep. 403, 414.
 Humboldt S. S. Co. vs. White Pass Yukon Route, 25 I. C. C.
 Rep. 136, 140.
 Eagle Pass Lbr. Co. vs. Nat. Rys. of Mexico, 25 I. C. C. Rep.
 5, 6, 7.
 Fullerton Lumber & Shingle Co. vs. B. B. & B. C. R. R. Co.,
 25 I. C. C. Rep. 376, 378.
 In re Rates, etc., of the La. Ry. & Nav. Co., 22 I. C. C. Rep. 558.
 Borgfeldt & Co. vs. S. P. Co., 18 I. C. C. Rep. 552, 553.
 Payne vs. Morgan's S. S. Co. 15 I. C. C. Rep. 185.
 Ullman vs. Adams Ex. Co., 14 I. C. C. Rep. 340, 345.
 Cosmopolitan Shipping Co. vs. Hamburg-American Packet
 Co., 13 I. C. C. Rep. 266, 271, 281.

The Commission, however, has no power to establish through routes and joint rates for shipments to destinations in foreign countries.

- Aransas Pass Channel & Dock Co. vs. G. H. & S. A. Ry. Co.,
 27 I. C. C. Rep. 403, 414.

§ 16. Rail and Water Carriers.

A carrier by water uniting with a rail carrier in making a rate for interstate traffic and issuing a through bill of lading therefor is subject to the Act with respect to such interstate traffic.

- U. S. vs. Woods, 145 Fed. Rep. 405.

Prior to the taking effect of the Panama Canal Act, approved August 24, 1912, the Commission's jurisdiction of interstate transportation did not extend over traffic moving entirely by water, a common arrangement for through transportation by rail and water being necessary to set up the authority of the Act. The Panama Canal Act gave the Commission the following jurisdiction in addition:

"When property may be or is transported from point to point in the United States by rail and water, through the Panama Canal or otherwise, the transportation being by a common carrier or carriers, and not entirely within the limits of a single state, the Interstate Commerce Commission shall have jurisdiction of such transportation and of the carriers, both by rail and by water, which may or do engage in the same, in the following particulars, in addition to the jurisdiction given by the Act to Regulate Commerce, as amended June eighteenth, nineteen hundred and ten.

"To establish through routes and maximum joint rates between and over such rail and water lines and to determine all the terms and conditions under which such lines shall be operated in the handling of the traffic embraced."

While a common arrangement for a through transportation of an interstate shipment by rail and water carriers brought the water carrier within the jurisdiction of the Commission, such water carrier could not then, and may not now, lawfully accept interstate shipments for transportation on through bills of lading issued by a rail carrier, unless the water carrier has on file with the Commission lawfully published rates applicable thereto.

See also:

- Delaware & Hudson Boat Lines, 40 I. C. C. Rep. 297.
 Port Huron & Duluth S. S. Co. vs. P. R. R. Co., 35 I. C. C. Rep. 475, 476.
 Chattanooga Packet Co., vs. I. C. R. R. Co., 33 I. C. C. Rep. 384, 392.
 Stone's Express vs. B. & M. R. R. Co., et al., 33 I. C. C. Rep. 638, 643.
 Curry & Whyte Co., vs. D. & I. R. R. R. Co., 32 I. C. C. Rep. 162, 171.
 App. of S. P. Co. in re Operation S. S. Co., 32 I. C. C. Rep. 690, 697, 698.
 Bowling Green Protective Assn. vs. E. & B. G. Packet Co., 31 I. C. C. Rep. 301.
 Pacific Nav. Co. vs. S. P. Co., 31 I. C. C. Rep. 472.
 Erickson vs. C. M. & St. P. Ry. Co., 29 I. C. C. Rep. 414, 416.
 New Orleans Board of Trade vs. I. C. R. R. Co., 29 I. C. C. Rep. 32.
 T. & N. O. R. Co. vs. Sabine Tram. Co., 227 U. S. 111.

See also: Chapter V, this volume; section 27, "Car Ferries as Common Carriers"; section 29, "Inland Water Carriers"; section 33, "Lighters and Lighterage Companies"; section 34, "Ocean Carriers"; section 55, "Common Arrangement Clause Not Applicable to All-Rail Transportation"; and section 58, "Rail-and-Water Transportation."

Compare:

- Charleston & Norfolk S. S. Co. vs. C. & O. R. R. Co., 40 I. C. C. Rep. 382, holding steamship company, owning no vessel, not a carrier. Application made under Panama Canal Act.

§ 17. Carriers Transporting Express Matter.

A railroad not otherwise subject to the Act to Regulate Commerce subjects itself to the authority of the Commission and the provisions of the Act if it transports express matter for an express company that is subject to the Act.

I. C. C. Confr. Rulings Bull. No. 6, Ruling No. 197.

§ 18. Bridges and Bridge Companies.

Bridges are included within the meaning of the term "railroad" in the Act, not for the purpose of exempting them from any liability to publish and observe their rates when such bridges are operated by their owners as common carriers, but rather to make certain that, where these agencies are employed by the railroad, the transportation service rendered by them shall be subject to the provisions of the Act.

Enterprise T. Co. vs. P. R. R. Co., 12 I. C. C. Rep. 327.

§ 19. Relation of Carrier Operating Over Bridge with Bridge Company.

Where a railroad company acquires by contract the right to use a bridge with approaches for its engines, cars and trains, section 1 of the Act to Regulate Commerce regards the railway company as the owner or operator of said bridge and approaches, as to all traffic transported by the railway company over said bridge; and as to all such traffic the railway company, and not the bridge company, is the common carrier.

K. & I. B. Co. vs. L. & N. R. R. Co., 37 Fed. Rep. 567.

§ 20. Bridges Connecting Two States.

A bridge company owning and operating freight and passenger trains, or either, for hire, over a bridge connecting two states, is a common carrier within the meaning of section 1 of the Act.

§ 21. Bridges Included in Term "Railroad."

The term "railroad" in section 1 of the Act to Regulate Commerce is defined to include all bridges used or oper-

ated in connection with any railroad, whether owned or operated under contract, agreement or lease.

Section 1, paragraph 2, Act to Regulate Commerce as amended.

§ 22. Bridges as Part of Carrier's Line.

A bridge constructed under contract with independent company to be used as a part of carrier's line is as much a part of the railroad of the carrier as if owned by it, and the railroad as a common carrier is subject to the Act; but the bridge company, as an independent company, is not a common carrier, and, therefore, not subject to the statute.

Enterprise T. Co. vs. P. R. R. Co., 12 I. C. C. Rep. 327.
Barnes on I. C., section 43, page 100, paragraph 4.

§ 23. Bridges Not Common Carriers.

A bridge company itself not owning or operating any rolling stock is not a common carrier within the scope and meaning of the Act. It merely furnishes a highway for interstate commerce.

K. & I. B. Co. vs. L. & N. R. R. Co., 37 Fed. Rep. 567.
C. & C. B. Co. vs. Com., 154 U. S. 204.

A bridge company which does not hold itself out as a common carrier, which has no rolling stock or motive power, whose structure is not rented to or operated in connection with a railroad and over whose structure no interstate freight has been transported, is not a common carrier subject to the Act, though some passengers were carried over it in the cars and by the motive power of a street railway company.

Kansas City vs. K. C. V. & T. Ry. Co., 24 I. C. C. Rep. 22, 26.
R. R. Com. of Ia. vs. I. C. R. R. Co., 20 I. C. C. Rep. 181, 186, 188.
R. R. Com. of Ind. vs. K. & I. B. & R. R. Co., 14 I. C. C. Rep. 563, 564.

§ 24. Cable Companies as Common Carriers.

See telegraph, telephone and cable companies, section 3, this chapter.

§ 25. Fast Freight Lines as Common Carriers.

Where a fast freight line operates over the lines of several connecting carriers, with agreed divisions of earnings and expenses amongst such carriers, it is the duty of such carriers to see that the fast freight line tariffs are filed with the Commission, and its rates made to conform with the requirements of the Act.

Vt. St. Grange vs. B. & L. R. R. Co., 1 I. C. C. Rep. 158; I. C. C. Tariff Cir. 18-A, Rule No. 15, page 36.

The fast freight line was the forerunner of the through route and had its origin in the lack of arrangements for the interchange of equipment. These fast freight lines acquired large numbers of freight cars and made arrangements with certain roads over which it was desired to establish a through service, and these lines are still in existence, although in most instances they are but a trade-name for a through fast freight service operating via established through routes.

Lake Lines App. under Panama Canal Act, 33 I. C. C. Rep. 700, 708, 709.

If a fast freight line is not incorporated, but merely operates under a trade-name as a service of several connecting carriers, its tariffs must be published and filed in the name of the corporate carriers and in conformity with the tariff rules governing all common carriers, subject to the Act.

§ 26. Express Companies as Common Carriers.

The amendment of the Act in 1906 (Hepburn Act) brought independent express companies, operating over lines of railway, within the jurisdiction of the Act as common carriers, and to the same extent as all other common carriers.

In re Express Rates, etc., 24 I. C. C. Rep. 380, 387, 423.

In re Express Rates, etc., 28 I. C. C. Rep. 131, 137.

The Commission regards express companies as agencies created by the railroads and recognized by law for the conduct of a certain kind of freight business, to which these agencies have added a service that is distinctive and peculiarly their own.

An express company, operating over or in connection with a railway line or lines, stands, under the Act, in the same attitude as that of a railroad, except in so far as the language of the Act specifically excludes it.

U. S. vs. Wells Fargo & Co., 161 Fed. Rep. 606, 609.

See also:

Am. Ex. Co., vs. U. S. 212 U. S. 522.

I. C. C. vs. D. L. & W. R. R. Co., 6 I. C. C. Rep. 148.

Douglas Shoe Co. vs. Adams Ex. Co., 19 I. C. C. Rep. 539, 542, 543.

Williams vs. Wells Fargo & Co., 18 I. C. C. Rep. 17, 18.

Saunders vs. So. Ex. Co., 18 I. C. C. Rep. 415.

In re Contracts of Express Companies, 16 I. C. C. Rep. 246, 249.

Am. Bankers Assn. vs. American Express Co., 15 I. C. C. Rep. 15, 21, 22.

California Commercial Assn. vs. Wells Fargo & Co., 14 I. C. C. Rep. 422, 425.

State vs. Adams Express Co., 171 Ind. 138, 151, 85 N. E. Rep. 337.

I. C. C. Confr. Rulings Bull. No. 6, Ruling No. 197.

And to the same extent the recent Cummins amendments to the Act applies to express companies.

Cummins Amendment, 33 I. C. C. Rep. 682, 698.

Stone's Express vs. B. & M. R. R. Co., 33 I. C. C. Rep. 638, 640.

§ 27. Car Ferries as Common Carriers.

The term "railroad" in section 1 of the Act to Regulate Commerce is defined to include all ferries used or operated in connection with any railroad, whether owned or operated under contract, agreement or lease.

Section 1, Act to Regulate Commerce as amended.

A ferry is a water carrier and primarily not subject to the Act; but when it affords facilities for "carrying on interstate commerce" and enters into arrangement with a rail carrier for the carriage of interstate traffic, it becomes subject to the jurisdiction of the Commission.

Enterprise T. Co. vs. P. R. R. Co., 12 I. C. C. Rep. 326.

A ferry constructed and effected under contract with an independent company to be used as part of a carrier's line, is as much a part of the railroad of the carrier as if owned by it, and the railroad is a carrier and subject to the Act and therefore the ferry, in its relation with the railroad, becomes subject to the Act.

Enterprise T. Co. vs. P. R. R. Co., 12 I. C. C. Rep. 326.

But an independent ferry company is not subject to the Act, nor to the jurisdiction of the Commission, even though it be engaged in receiving from and delivering freight to a connecting railroad, if it is not operating with such railroad under a "common control, management, or arrangement" for a continuous carriage. Such a ferry, although an instrumentality of commerce over which Congress has full and complete power of regulation and control, has not been brought within the scope of the Act to Regulate Commerce.

Gloucester Ferry Co. vs. Pa., 114 U. S. 196.

Grain Rates from Milwaukee, 33 I. C. C. Rep. 417, 424.

In *re N. Y. C. & H. R. R. vs. Hudson County*, 227 U. S. 248, the jurisdiction of the Interstate Commerce Commission was declared to include the New York-Jersey City ferries, requiring such ferries to file with the Interstate Commerce Commission rates, fares, rules, and regulations, as required by section 6. The Court held that Congress did not divide its authority over the elements of interstate commerce intermingled with the movement of the regulated interstate ferriage, for to do so would render the national authority inefficacious by the confusion and conflict which would result.

The Supreme Court of the United States, in the course of its opinion in this case, said:

"It is equally clear that the contention of the defendant in error as to the absence of all power in Congress over interstate ferries is merely academic. From this it necessarily arises that the only ground relied upon to sustain the judgment below is the ruling in the **Gloucester Ferry Case**, and the further proposition that there has been no action of Congress over the subject of the ferriage here involved which authorizes the holding that state power no longer obtains. As, therefore, the claim on the one side of an all-embracing and exclusive federal power may be, temporarily at least, put out of view and the assertion on the other of an absolutely exclusive state power may also be eliminated from consideration because not relied upon or because it is both demonstrated and admitted to be without foundation, it follows to dispose of the case we are called upon only, following the ruling in the **Gloucester Ferry Case**, to determine the single and simple question whether there has been such action by Congress as to destroy the presumption as to the existence in the state of vicarious and revocable authority over the subject. We say simple question because its decision is, we think, free from difficulty, in view

of the express provision of the first section of the Act to Regulate Commerce (Act of February 4, 1887, chapter 104, 24 Stat. 379), subjecting railroads as therein defined to the authority of Congress, and expressly declaring that 'the term railroad as used in this Act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, * * *.' The inclusion of railroad ferries within the text is so certain and so direct as to require nothing but a consideration of the text itself. Indeed, this inevitable conclusion is not disputed in the argument for the defendant in error, but it is insisted that as the text only embraces railroad ferries and the ordinances were expressly decided by the court below only to apply to persons other than railroad passengers, therefore the action by Congress does not extend to the subject embraced by the ordinances. But as all the business of the ferries between the two states was interstate commerce within the power of Congress to control and subject in any event to regulation by the state as long only as no action was taken by Congress, the result of the action by Congress leaves the subject, that is, the interstate commerce carried on by means of the ferries, free from control by the state. We think the argument by which it is sought to limit the operation of the Act of Congress to certain elements only of the interstate commerce embraced in the business of ferriage from state to state is wanting in merit. In the absence of an express exclusion of some of the elements of interstate commerce, entering into the ferriage, the assertion of power on the part of Congress must be treated as being coterminous with the authority over the subject as to which the purpose of Congress to take control was manifested. Indeed, this conclusion is inevitable since the assumption of a purpose on the part of Congress to divide its authority over the elements of interstate commerce

intermingled in the movement of the regulated interstate ferriage would be to render the national authority inefficacious by the confusion and conflict which would result."

See also:

New York-Jersey City Ferry Rates, 37 I. C. C. Rep. 103, 106.
 Peninsular & Occidental S. S. Co., 37 I. C. C. Rep. 432, 435.
 Grain Rates from Milwaukee, 33 I. C. C. Rep. 417, 424.
 O.-W. R. R. & N. Co., ownership of Steamboats, 33 I. C. C. Rep. 658, 661, 663.
 Illinois Coal Cases, 32 I. C. C. Rep. 659, 676, 681.
 Colonial Salt Co. vs C. B. & Q. R. R. Co., 31 I. C. C. Rep. 559, 569.
 St. Clair Co. vs. I. S. & C. T. Co., 192 U. S. 454.
 Pt. Richmond & B. P. F. Co. vs. County of Hudson, 234 U. S. 317.
 Covington Bridge Co., vs. Kentucky, 154 U. S. 204.
 L. S. & M. S. Ry. vs. Ohio, 165 U. S. 365.
 U. S. vs. Union Bridge Co., 204 U. S. 364.
 Manigault vs. Springs, 199 U. S. 473.
 The Abby Dodge, 223 U. S. 166.
 Mayor of New York vs. Starin, 106 N. Y. 1, 12 N. E. Rep. 631.
 Mayor of New York vs. New Eng. Transp. Co., 14 Blatch, 159 Fed. Cas. 10197.
 Brodnax vs. Blake, 94 N. C. 675.

Compare:

Levy vs. U. S. 177 U. S. 621.
 Wilmington Trans. Co. vs. R. R. Com. of Calif. 236 U. S. 151.
 Sault Ste. Marie, etc., vs. International Trans. Co., 234 U. S. 333.

(1) **Car Ferries.** A car ferry is a vessel or barge, or sometimes a float, fitted with tracks for the holding of railroad cars and the transporting of them across a waterway or lake. A car ferry is subject to the same regulation by interstate authority as ferries in general.

Car ferries are in most instances owned and operated by the rail carriers and become included in "all-rail" routes.

I. C. C. Conference Rulings Bulletin No. 6, Ruling No. 284.

(2) **Municipal Ferries.** Where a municipal ferry arranges with rail carriers to perform its service in the transportation of passengers under through tickets, including the ferry service, such municipal service is subject to the Act.

I. C. C. Confr. Rulings Bull. No. 6, Rulings No. 162.

Prior to the amendment to the Act of June 29, 1906, ferries were not subject to the jurisdiction of the Commission except when used by a rail carrier and operated as a part of its road.

N. Y. C. & H. R. R. Co. vs. Freeholders of Hudson, 76 N. J. L. 654, 74 Atl. Rep. 954.

In the appeal of this same case the Supreme Court held that section 1 of the Act, as amended, subjected railroad ferries to its provisions, Congress having so occupied the field of regulation as to render invalid an ordinance fixing rates on a railroad passenger-ferry extending from New York City across the river to Weehawken, N. J., and that regardless of whether the passengers rode only on the ferry or rode thereon in connection with travel on the railroads owning the same.

N. Y. C. & H. R. R. Co. vs. Board of Freeholders, 227 U. S. 248.

See also quotation from the opinion of the Supreme Court in this section, *ante*.

§ 28. Foreign Railroads as Common Carriers.

Foreign railroads, as common carriers, suffer no obstruction imposed upon them by the law to transportation from or into the United States, but such carriers in conducting their business within this country are required

to conform to the same regulations that govern domestic carriers.

In re Investigation of Acts of G. T. R. R. Co., 3 I. C. C. Rep. 89.

Curry & Whyte Co. vs. D. & I. R. R. R. Co., 32 I. C. C., Rep. 162, 171.

Application of S. P. Co., in re Operation S. S. Co., 32 I. C. C. Rep. 690, 697, 698.

T. & P. Ry. Co. vs. I. C. C., 162 U. S. 197.

Buttfield vs. Stranaham, 192 U. S. 470, 493.

T. & P. Ry. Co. vs. R. R. Com. of La. 182 Fed. 1005.

In re Rates, etc., of La. Ry. Co., 22 I. C. C. Rep. 55.

Cosmopolitan Shipping Co. vs. Hamburg-American Packet Co., 13 I. C. C. Rep. 266, 271, 281.

The character of foreign commerce is not determined by the billing, but by the fact that at point of origin it is destined to a foreign port and is taken up by successive intervening common carriers.

Application of S. P. Co., in re Operation S. S. Co., 32 I. C. C. Rep. 690, 697, 698.

S. P. Term. Co. vs. I. C. C. 219 U. S. 498, 527.

T. & N. O. R. R. Co. vs. Sabine Tram Co., 227 U. S. 111.

In the **Sabine Tram Co. case**, *supra*, the Supreme Court said:

"The determining circumstance is that the shipment of the lumber to Sabine was but a step in its transportation to its real and ultimate destination in foreign countries. In other words, the essential character of the commerce, not its mere accidents, should determine. It was to supply the demand of foreign countries that the lumber was purchased, manufactured, and shipped, and to give it a various character by the steps in its transportation would be extremely artificial. Once admit the principle and means will be afforded of evading the national control of foreign commerce from points in the interior of a state. There must be transshipment at the seaboard, and if that may be made the point of ultimate destination by the device of separate bills of lading

the commerce will be given local character, though it be essentially foreign."

This is a reaffirmance of the same principle laid down by the court in the **S. P. Terminal Co. case**, *supra*, where it was said:

"The manufacture or concentration on the wharves of the terminal company are but incidents, under the circumstances presented by the record, in the transshipment of the products in export trade and their regulation is within the power of the Interstate Commerce Commission. To hold otherwise would be to disregard, as the Commission said, the substance of things and make evasions of the Act of Congress quite easy. It makes no difference, therefore, that the shipments of the products were not made on through bills of lading or whether their initial point was Galveston or some other place in Texas. They were all destined for export and by their delivery to the Galveston, Harrisburg & San Antonio Railway they must be considered as having been delivered to a carrier for transportation to their foreign destination, the terminal company being a part of the railway for such purpose. The case, therefore, comes under **Coe vs. Errol**, 116 U. S. 517, where it is said that goods are in interstate and necessarily as well in foreign commerce when they have 'actually started in the course of transportation to another state, or delivered to a carrier for transportation.'"

A common arrangement for the transportation of foreign commerce may exist without the establishment of a through route or the recognition of a through bill of lading. The fact that there is an arrangement by which it is to be carried as foreign freight is evidenced by the conduct of each of the carriers.

Application of **S. P. Co.**, in re **Operation S. S. Co.**, 32 I. C. C. Rep. 690, 697, 698.

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C. N. O. & T. P. Ry. Co. vs. I. C. C., 162 U. S. 184.
Bac Bros. Co. vs. D. & R. G. R. R. Co., 223 U. S. 479, 491.
R. R. Comm. of La. vs. T. & P. Ry. Co., 229 U. S. 336, 341.

See also:

Aransas Pass Channel & Dock Co. vs. G. H. & S. A. Ry. Co.,
27 I. C. C. Rep. 403, 414.
Fullerton Lbr. Shingle Co. vs. B. B. & B. C. R. R. Co., 25 I. C.
C. Rep. 376, 378.
Humboldt S. S. Co. vs. W. P. & Y. Route, 25 I. C. C. Rep. 136,
140.
Eagle Pass Lbr. Co. vs. Nat'l Rys. of Mexico, 25 I. C. C.
Rep. 5.

§ 29. Inland Water Carriers.

Inland water carriers when participating in interstate transportation under common control, management, or arrangement with rail carriers have always been to the extent of such transportation subject to the Act, but as to other traffic not so transported it was held **In re Jurisdiction of Water Carriers**, 15 I. C. C. Rep. 205, 207, that they were removed from the jurisdiction of the Act. This limitation upon the authority of the Act was removed by the additional jurisdiction conferred by the Panama Canal Act.

The Elkins Act of 1903 was not made applicable to carriers by water and a water carrier did not become subject to the Act in respect to interstate shipments, the movement of which was in part over its line and part over the line of a connecting rail carrier, unless, as provided in section 1 of the Act to Regulate Commerce, such movement was "under a common control, management, or arrangement" with the rail carrier or carriers for the continuous carriage of such interstate shipments.

National Transp. Co. vs. U. S. 178 Fed. Rep. 364.

It has also been held that there is no arrangement for

continuous carriage or shipment from one state to another between a rail carrier and a carrier by water not subject to the Act, where shipments by railroads entirely within one state are consigned to the care of a carrier by water which acts as the agent of the consignee at a point in that state and the carrier by water transports such consignments to a point in another state, such ultimate destination not appearing in the original carrier's bill of lading.

In the matter of Transportation by the C. & O. Ry. Co. et al., 21 I. C. C. R. 207. (Citing C. N. O. & T. P. R. R. Co. vs. I. C. C. 162 U. S. 184.)

G. C. & S. F. R. R. Co. vs. Texas, 204 U. S. 403, 51 L. Ed. 540, affirming 97 Texas 274, 78 S. W. 495, citing Coe vs. Errol, 116 U. S. 517, 29 L. Ed. 715.

The jurisdiction of the Interstate Commerce Commission over inland water carriers has been the subject of recent supplementary legislation. The Panama Canal Act amended section 6 of the Act to Regulate Commerce to the following effect:

"When property may be or is transported from point to point in the United States by rail and water, through the Panama Canal or otherwise, the transportation being by a common carrier or carriers, and not entirely within the limits of a single state, the Interstate Commerce Commission shall have jurisdiction of such transportation and of the carriers, both by rail and by water, which may or do engage in the same, in the following particulars, in addition to the jurisdiction given by the Act to Regulate Commerce, as amended June eighteenth, nineteen hundred and ten. * * *

"To establish through routes and maximum joint rates between and over such rail and water lines and to determine all the terms and conditions under which such lines shall be operated in the handling of the traffic embraced * * *."

But this does not give the Commission authority over all traffic moving entirely by water.

It is obvious that the enlargement of the Commission's authority over inland water carriers was not predicated upon an operating control, but rather on tariff grounds, to the end that the continuity of interstate shipments might be promoted through the establishment and operation of through routes and joint rates between rail and water carriers.

Since the passage of the Panama Canal Act, approved August 24, 1912, the Commission has conducted an investigation of the conditions and relations of interownership obtaining between the lake lines and rail lines, under the following provisions of the Panama Canal Act:

"From and after the 1st day of July, 1914, it shall be unlawful for any railroad company or other common carrier subject to the Act to Regulate Commerce to own, lease, operate, control, or have any interest whatsoever (by stock ownership or otherwise, either directly, indirectly, through any holding company, or by stockholders or directors in common, or in any other manner) in any common carrier by water operated through the Panama Canal or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic or any vessel carrying freight or passengers upon said water route or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic; and in case of the violation of this provision, each day in which such violation continues shall be deemed a separate offense.

"If the Interstate Commerce Commission shall be of the opinion that such existing specified service by water other than through the Panama Canal is being operated in the interest of the public and is of advantage to the convenience and commerce of the people, and that such extension will neither exclude, prevent,

nor reduce competition on the route by water under consideration, the Interstate Commerce Commission may, by order, extend the time during which such service by water may continue to be operated beyond July 1, 1914."

In passing upon the question of whether or not a particular boat line was being operated within the requirements of the Panama Canal Act, the Commission commented upon the purpose and scope of this legislation as follows:

"From an examination of the congressional debate from which the act emerged, it is at once clear that the spirit which undoubtedly prompted this legislation was a desire to preserve to the common interest of the people, free and unfettered, the 'water roadbed' via the Panama Canal, which was nearing completion. Coupled as it is, the legislative purpose of the other parts of the amendment with respect to waters "elsewhere" must necessarily have been to restore all the water routes of the country to the same condition of freedom from any domination that would reduce their usefulness.

"For any case to be within the spirit of this proviso it is necessary to show a situation in which are present all the elements which prevail, or would prevail, were the water service independently operated. On a watercourse where the boats and boat lines are free from domination or control by the railroads, and where they are left to survive as their merit or the ingenuity of their owners makes possible, there will be, and always is, a healthy rivalry and striving between such boat lines themselves and with paralleling railroads for all suitable and available traffic. There is competition. This rivalry manifests itself in several ways. The rates charged fluctuate according to economic principles, and the shipper enjoys invariably, as a result, lower charges for the transportation routed over such waterways and thereby reaps a return from

the 'nation's highway.' Necessarily, coincident with the lowering of the rate, there is a rivalry in service which is an equally strong weapon of competition. The condition is one which results in the beneficial use of the waterways accruing to the shippers. As far as this legislation concerns water routes elsewhere than through the Panama Canal, the spirit and purpose of it is to restore to the people the beneficial use of the natural common highways.

"The right to use the waterways of the country as a means of transportation is a natural right, but this right may not be abused to the injury of others, and it is the public right that the waters be so used as to return benefit to the people.

"The waterways of the country furnish ready-made roadbeds for transportation routes, on which the rates for shipment may be made low because of this physical fact. But these arteries of commerce, without boats to ply on them, are useless for transportation purposes. And although there may be many boats plying on these water routes, they may be so operated as to produce practically the same condition of things as would exist were there no boats afloat.

"As a natural and usual course of experience, where a railroad acquires and undertakes to operate a competing boat line, the rate for the water transportation ceases to be influenced solely by those ordinary conditions which affect such traffic, because a new element is introduced into the situation, namely, the interest of the owning railroad.

"This discussion of general principles points the basis for the legislation here under consideration. If such is the basis, what is the purpose of the legislation, if it is not to relieve the watercourses of the country from the domination of the rail carriers?

"Congress has decreed that there shall be a restoration of conditions which prevailed when railroads had no interest in and exercised no control over the boat lines plying the country's water routes. That the legislation might not be arbitrary but be effective

within constitutional limitations, certain provisions were made so that in given instances which form exceptions to the usual experiences in cases of joint ownership, such ownership may be continued. To comply with this legislative direction, however, it is necessary to divorce the railroads from their boat lines, unless the particular case comes within the exception as provided. If this is not the result, of what avail is this legislation?

"The inquiry in these cases is, therefore, Is the joint operation of these boat lines such as to make of them an exception? Or, in the words of the statute, Is the service by water being operated in the interest of the public, and is it of advantage to the convenience and commerce of the people, and will an extension and a continuance thereof exclude, prevent, or reduce competition on the route by water under consideration?

"The contentions of petitioners as to responsibility and regularity of this service under joint operation lose weight when it appears that there has been no lowering of the cost of water transportation accompanying them. It appears from correspondence passing between a boat-line manager and an official of the owning railroad, which forms a part of these records, that this manager attributes the small tonnage hauled by his line, and the consequent small revenues, to the fact that the differential between the lake-and-rail rates and the all-rail rates is too small. He urged a larger differential, assuring his superior that such a policy would enable him to profitably operate the boat line.

"Instead of lower rates in prospect, it is made to appear that it is only the greater financial strength of the owning railroads that enables the present boats to operate, as it is contended that certain boat lines are being operated at a loss. If this be true, then there is no prospect for lower rates under continued joint ownership, and the public is reaping little benefit from this waterway, and the situation is almost the same and will be the same as if no waterway existed.

"No doubt, under joint operation, certain economies can be effected, but these economies have not manifested themselves in a reduced lake-and-rail transportation cost to the public. Instead of any reduction in lake-and-rail rates they have been steadily advanced under joint ownership. Beginning about 1900, when trunk line control over the lake lines was becoming perfected, the first-class lake-and-rail rate from New York to Chicago has been advanced by successive increases from 54 cents to 62 cents; the rates on the other classes have been correspondingly advanced. In 1910, according to statements in the records which were not controverted, the trunk line interests agreed that the lake-and-rail rates should actually be advanced to the all-rail basis, and thus wipe out the differential except on first class, which was to be advanced from 62 to 70 cents. This action was only thwarted by the refusal of a foreign railroad owning a lake line to acquiesce therein. These successive advances, as the records show, have had the effect not only of preventing an increase in lake line tonnage, but in diverting from the lake routes to the all-rail lines, part of the tonnage which formerly moved on the lakes. Furthermore, there is much in the records tending to show that the very purpose of these advances in lake-and-rail rates was to divert tonnage to the all-rail lines. As a direct result of this rate policy of the owning railroads, the lake boats have operated with small cargoes, although their operating expense was almost as great as if they had been fully loaded. This has in turn resulted in a high operating cost to the lake lines per unit of freight. Does not this policy fully explain the lake line deficit? Again, do not such facts make clear that whatever economies might be realized by joint ownership are offset by the waste resulting from the unfair use of vessel tonnage in the interest of the owning railroads? The railroad control of these boat lines can not be said to be in the public interest when the policy of these railroads has been, by an artificial rate structure to deprive the

public of the natural benefits that would flow from a free use of this waterway.

"In deciding these cases, the Commission is required to judge as to whether or not these boat lines are being operated in the public interest under joint ownership, and then it must say whether the continuance of this operation will result in reducing, preventing, or excluding competition on the route by water.

"That the joint ownership and operation of these boat lines has resulted in no real benefit to the people and that operation is not in the interest of the public or of advantage to the convenience and commerce of the people is established by the facts as above indicated, and a complete monopoly is exercised by the owning railroads over the lake line situation through the medium of the Lake Line Association.

"The arguments that the increased powers of the Commission have remedied the situation are faulty, since it does not appear that this Commission has any special jurisdiction under this amendment to stop the operation of this Lake Line Association or to prevent the establishment of some other like arrangement later on. These arguments also lose weight in view of the fact that the increased jurisdiction of the Commission will be just as available in the control of the lake line situation hereafter under independent operation of the lake lines, as under a continued joint operation. The public will enjoy all the benefits contained in the amendment through the enlargement of the Commission's jurisdiction with respect to water transportation and at the same time, and in addition, there will accrue such benefits as will result when water rates and service are influenced by competition.

"After divorcement this Commission may still regulate just as fully as under joint control, the through rail-and-water rate, fixing a reasonable maximum. It may also fix the maximum rail proportional of such through rate. It may still require the physical con-

nection between the dock of a water line and the rails of any and all carriers serving a port on interchange."

In re Application of Lake Lines, 33 I. C. C. Rep. 699, 700.
Augusta & Savannah Steamboat Co. vs. O. S. S. Co., of Savannah, 26 I. C. C. Rep. 380, 384.

The boat lines operating on the great lakes in conjunction with the barge lines operating on the Erie Canal furnish a through water route from western lake ports to the eastern seaboard. It is significant that the through route arrangements and the interchange of traffic between lake lines and these canal barge lines have been terminated under the joint ownership of the lake lines, and the traffic has practically disappeared, to the injury of the boat lines and of the Erie Canal barge lines on eastbound traffic. There is no power in the Commission to require the establishment of a through route between these rail road-owned lake lines and barge lines operating the Erie Canal, but under divorcement the lake lines will be free to make arrangements for the through carriage of freight in connection with the Erie Canal barge lines, and it will be to their interest to do so.

On the other hand the Commission has found certain car-ferries operating on the Great Lakes in conjunction with railroads to be of advantage to the convenience and commerce of the people and that a continuance thereof will neither exclude, prevent or reduce competition on the routes by water in such instances. And in such case the ferry boat lines were required to file their tariffs with the Commission in accordance with the provisions of the Act taking effect July 1, 1915.

The policy of the Panama Canal Act is the bringing about of a discontinuance of railroad ownership and control of water lines, except in those instances where the Commission is of the opinion that the existing specified service by water, other than through the Panama Canal

is being operated in the interests of the public and is of advantage to the convenience and commerce of the people and that such extension will neither exclude, prevent, nor reduce competition on the route by water under consideration. And in such cases the "existing specified service by water" is not determined or measured by the character of the shipments, but by the vessel by which they are borne. In construing this portion of the Act, the Commission in the Application of the Southern Pacific Company, said:—

"If, therefore, it be found that the service here considered other than that through the Panama Canal, is operated in the interests of the public and is of advantage to the convenience of the people, and that its continuance will neither exclude, prevent, nor reduce competition on the route by water, the Act contemplates authorizing a continuance of the service, even though there is, or may be, some measure of competition between petitioner and the steamship line.

"The proposition on the record is to operate the boats through the Panama Canal, but it is also proposed to carry freight that will not pass through the canal or be competitive. The question arises, therefore, whether this language is to be construed as applying to the vessels or to each particular shipment carried by the vessels. The language upon this point is, 'such existing specified service.' The petitioner would have us construe this language as applying to each shipment carried. But reference to other portions of the section lead to a different conclusion. The language employed is, 'such application may be filed for the purpose of determining whether any existing service is in violation of this section and pray for an order permitting the continuance of any vessel or vessels already in operation.' Here the words 'existing service' clearly refer to any vessel or vessels. When we consider the probable difficulties to be met by the common carrier in excluding particular shipments and the easy way in which the terms of the

statute could be evaded under such a construction, we are led to hold that the words 'specified service' refer to the vessel or vessels operated. Under the proposed amendment of the application and the testimony of the vice-president of the steamship company, we are confronted with the fact that these vessels are proposed to be operated through the canal to Colon. In view of these conditions and of the policy and requirements of the Act, we are of the opinion that as to vessels of the steamship company which pass through the Panama Canal the Commission has no power to extend the time within which they may continue to be operated."

The Act provides that in every case in which the Commission grants extension of time during which the service by water may continue to be operated beyond July 1, 1914, "the rates, schedules, and practices of such water carrier shall be filed with the Interstate Commerce Commission and shall be subject to the Act to Regulate Commerce and all amendments thereto in the same manner and to the same extent as is the railroad or other common carrier controlling such water carrier or interested in any manner in its operation." This language is definite and unqualified. It applies to every case in which such extension is granted, and it follows that if, under an amendment to the petition or upon further hearing, extension of time be granted as to any of the boats of the steamship company, the rates, schedules, and practices governing traffic subject to the Act, moved by such boats, must be filed with the Commission and be subject to all of the provisions of the Act in the same manner and to the same extent as those of the rail carrier.

Peninsular & Occidental S. S. Co., 38 I. C. C. Rep. 662.
Ocean S. S. Co. of Savannah, 37 I. C. C. Rep. 422.
Peninsular & Occidental S. S. Co., 37 I. C. C. Rep. 432.

The Boat "H. B. Plant", 37 I. C. C. Rep. 453.
Steamship Great Northern, 37 I. C. C. Rep. 260, 261.

See also:

Port Huron & Duluth S. S. Co. vs P. R. R. Co., 35 I. C. C. Rep. 475.
Federal Sugar Refining Co. vs. C. R. R. of N. J., 35 I. C. C. 488.
Steamer Lines on Chesapeake Bay, 35 I. C. C. Rep. 692, 697.
P. Co., of Canada, Operation of Pa. Ontario Transp. Co., 34 I. C. C. Rep. 47.
B. R. & P. Ry. Co. of Canada, Operation of Car Ferry Co., 34 I. C. C. Rep. 52.
G. T. W. Ry. Co., Operation of Car Ferry Co., 34 I. C. C. Rep. 54.
S. P. Ownership of Oil Steamers, 34 I. C. C. Rep. 77, 81.
A. A. R. R. Co., Operation of Car Ferry Boats, 34 I. C. C. Rep. 83, 85.
P. M. & B. L. E. R. R. Co.'s, Operation of Car Ferry Boats, 34 I. C. C. Rep. 86.
O. W. R. R. & N. Co., Ownership of S. F. & P. S. S. Co., 34 I. C. C. Rep. 165, 168.
S. P. Co. Steamboats on Sacramento River, 34 I. C. C. Rep. 174, 176.
Erie R. R. Co., Operation of Lake Keuka Nav. Co., 34 I. C. C. Rep. 212.
C. & E. R. R. Co., Ownership of Water Equipment, 34 I. C. C. Rep. 218, 220.
Joint Ownership & Operation of Mackinac Transp. Co., 34 I. C. C. Rep. 229, 230.
S. P. Co. Ownership of Stock in Transportation Co., 34 I. C. C. Rep. 648.
Chattanooga Packet Co. vs. I. C. R. R. Co., 33 I. C. C. Rep. 384, 391.
Rates on Asphaltum, etc., 33 I. C. C. Rep. 480, 486.
S. P. Co. Ownership of Schooner Pasadena, 33 I. C. C. Rep. 476, 478.
Financial Relations, etc., L. & N. R. R. Co., 33 I. C. C. Rep. 168, 207, 211, 212.
Railway Ownership of Boat Line on Lake Tahoe, 33 I. C. C. Rep. 426, 427.
Damon vs. Crosby Transp. Co., 33 I. C. C. Rep. 448, 451.
Lake Line Applications, 33 I. C. C. Rep. 699, 705.
Tampa Board of Trade vs. A. V. Ry. Co., 33 I. C. C. Rep. 457, 461.
Ownership of Dallas, Portland & Astoria Nav. Co., 33 I. C. C. Rep. 462, 467.
G. F. & A. Ry. Co., Ownership of Boat Line, 33 I. C. C. Rep. 632, 633.
The Twin Cities Cases, 33 I. C. C. Rep. 577, 582.
Eastern Shore Development S. S. Co. vs. B. & O. R. R. Co., 32 I. C. C. Rep. 238, 242.
Application of S. P. Co. in re Operation S. S. Co., 32 I. C. C. Rep. 690, 699.
Transcontinental Commodity Rates, 32 I. C. C. Rep. 449, 457.

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- Mobile Chamber of Commerce vs. M. & O. R. R. Co., 32 I. C. C. Rep. 272, 278.
Commodity Rates to Pacific Coast Terminals, 32 I. C. C. Rep. 611, 618.
Decatur Nav. Co. vs. L. & N. R. R. Co., 31 I. C. C. Rep. 281, 288.
Financial Investigation of N. Y., N. H. & H. R. R. Co., 31 I. C. C. Rep. 32, 44.
Pacific Nav. Co. vs. S. P. Company, 31 I. C. C. Rep. 472, 479.
Colonial Salt Co. vs. C. B. & Q. R. R. Co., 31 I. C. C. Rep. 559, 562, 563.
Milwaukee Produce & Fruit Exchange vs. Crosby Transportation Co., 30 I. C. C. Rep. 653, 655.
Tampa Board of Trade vs. L. & N. R. R. Co., 30 I. C. C. Rep. 377, 381.
Fourth Section Violations in the Southeast, 30 I. C. C. Rep. 153, 169, 170, 183, 193, 230, 259, 263, 266, 269, 278.
Lake-and-Rail Butter and Egg Rates, 29 I. C. C. Rep. 45, 51.
St. Paul and Puget Sound Accounts, 29 I. C. C. Rep. 508, 516.
Lumber Rates from Oregon and Washington, 29 I. C. C. Rep. 609, 618.
New England Investigation, 27 I. C. C. Rep. 560, 567.

Compare :

- Galveston Coml. Assn. vs. A. T. & S. F. Ry. Co., 25 I. C. C. Rep. 216, 255.
Escanaba Business Men's Assn. vs. A. A. R. R. Co., 24 I. C. C. Rep. 11, 17.
Cosmopolitan Shipping Co. vs. Hamburg-American Packet Co., 13 I. C. C. Rep. 266, 274, 281.
I. C. C. vs. Goodrich Company, 224 U. S. 194.
Goodrich Transit Co. vs. I. C. C. 190 Fed. Rep. 943, 959.
L. & N. R. R. Co. vs. I. C. C., 184 Fed. Rep. 118, 123.
Joseph Ullman vs. Adams Express Co., 14 I. C. C. Rep. 340, 345.
Lykes Steamship Line vs. Commercial Union, 13 I. C. C. Rep. 310, 316.
Benton Transit Co. vs. Benton Harbor, St. J. Ry. & Light Co., 13 I. C. C. Rep. 542, 545.

§ 30. Interstate Railroads.

A railroad company which holds itself out to the public as a common carrier, files tariffs with and makes reports to the Interstate Commerce Commission as is required of common carriers by law, and is engaged in the transportation of interstate traffic, is a common carrier subject to the provisions of the Act to Regulate Commerce. The test of whether it is a common carrier is not the extent to

which its service is used, but the right of the public to demand service of it.

Tap Line Cases, 234 U. S. 1.

See also:

Joint Rates with Birmingham Southern R. R. Co., 32 I. C. C. Rep. 110.

Tap Line Cases, 31 I. C. C. Rep. 490.

Compare:

Stonega Coke & Coal Co. vs. L. & N. R. R. Co., 23 I. C. C. Rep. 17.

The term "railroad" includes all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether used or operated under a contract, agreement, or lease, and all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated in the Act, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of such property.

Act to Regulate Commerce, section 1.

No distinction is made in the Act between railroads operated by steam power and railways whose motive power is electricity. The Act terms them "common carriers" and applies the jurisdiction of the Commission to such common carriers when engaged in the interstate transportation of persons and property as designated in the statute. Therefore, both steam and electrically operated railways, when engaged in such interstate transportation, fall within the authority of the Act.

Act to Regulate Commerce, section 1.

West End Imp. Club vs. O. & C. B. Ry. & Br. Co., 17 I. C. C. Rep. 239.

C. & M. Elec. R. R. Co. vs. Ill. Cent. R. R. Co., 13 I. C. C. Rep. 20.
O. & C. B. St. L. Ry. Co. et al., vs. I. C. C., 179 Fed. Rep. 243.

An electric street railway line operating between the cities of Omaha and Council Bluffs was held to be a common carrier, engaged in the interstate transportation of persons, and therefore amenable to the terms and jurisdiction of the Act.

West End Imp. Club vs. O. & C. B. Ry. Co. et al., 17 I. C. C. Rep. 239.

An electric street railway operating between the City of Washington, D. C., and Chevy Chase Lake, in Montgomery County, Md., was held to be a common carrier engaged in interstate transportation within the intent and meaning of the Act.

Those interstate roads which are constructed upon public highways to provide the means for local passenger transportation (by electricity) in the streets of towns and cities and their various suburbs, are amenable to the Act.

Wilson vs. R. C. Ry Co., 7 I. C. C. Rep. 83.

Jurisdiction of Commission over electric railways engaged in interstate transportation as defined by the Act was affirmed by courts.

O. & C. B. St. L. Ry. Co. vs. I. C. C., 230 U. S. 324, 57 L. Ed. 1501.
O. & C. B. St. L. Ry. Co. vs. I. C. C., 179 Fed. Rep. 243.

§ 31. Electric Street Railways.

See section 30, this volume, chapter V, "Interstate Railroads," ante.

§ 32. Intraterritorial Common Carriers.

Any common carrier engaged in the transportation of persons and property as defined in the Act between points

within any territory of the United States, and where such transportation is performed wholly within such territory, is subject to the Act. Jurisdiction over intraterritorial transportation was conferred upon the Commission by the amendment of June 29, 1906.

Act to Regulate Commerce (Amd. 1906) section 1.

The Commission's jurisdiction over intraterritorial common carriers is purely statutory and when a territory becomes a state the intraterritorial jurisdiction of the statute expires automatically, and the prohibition against intrastate regulation by the national government immediately takes effect, excluding the Commission's power to proceed under complaint even though such complaint was filed prior to the date of admission to statehood.

Chandler Cotton Oil Co. vs. Ft. Smith & W. R. R. Co., 13 I. C. C. Rep. 473.

Hussey vs. Chicago, R. I. & P. Ry. Co., 13 I. C. C. Rep. 366.

Since all territories within the United States have been admitted to statehood this intraterritorial jurisdiction has automatically ceased.

(1) **Common Carriers in Alaska.** The Commission originally held that it had no jurisdiction over common carriers within the territory of Alaska, but the Supreme Court of the United States ruled to the contrary, and the Commission has since entertained its authority therein.

In its original holding as to its jurisdiction over common carriers in Alaska, the Commission followed the territorial status of Alaska as defined by the Supreme Court in the Insular Cases:

Humboldt S. S. Co. vs. U. S., 224 U. S. 474.

Humboldt S. S. Co. vs. White Pass & Yukon Route, 25 I. C. C. Rep. 136, 140.

Humboldt S. S. Co. vs. White Pass & Yukon Route, 19 I. C. C. Rep. 105.

Rasmussen vs. U. S., 197 U. S. 516, 49 L. Ed. 862.
 Dorr vs. U. S., 195 U. S. 138, 49 L. Ed. 128.
 Hawaii vs. Mankicki, 190 U. S. 197, 47 L. ed. 1016.
 Downes vs. Bidwell, 182 U. S. 244, 45 L. Ed. 1088.

See also:

Article 1, Section 8, clause 3, Const. of U. S.
 In the matter of Jurisdiction over Rail and Water Carriers
 Operating in Alaska, 19 I. C. C. Rep. 81.

(2) **Common Carriers in Porto Rico.** The Safety Appliance Act of 1893, and as amended in 1896, applied only to "any common carrier engaged in interstate commerce by railroad." By the amendatory Act of 1903 the provisions and requirements of the Act of 1893 were made applicable "to common carriers by railroads in the territories and the District of Columbia." These amendments were later followed by amendatory acts of 1910 and 1911.

Even after this amendment, however, it was not considered that the provisions of the Safety Appliance Acts were applicable to common carriers by railroad in Porto Rico, the general understanding being that the territories referred to were those included within the territorial limits of the United States.

The Supreme Court having held that the Safety Appliance Acts applied to common carriers by railroad in Porto Rico, the Interstate Commerce Commission entered upon an investigation to determine the character and kind of equipment used in the transportation of passengers and property by common carriers by railroad in Porto Rico, the safety appliances in use and the character of appliances that might be required under the provisions of the Safety Appliance Acts.

The jurisdiction of the Interstate Commerce Commission is not to be determined by anything other than the language of section 1 of the Act, and in this section is

found a clear distinction drawn between interstate commerce and foreign commerce to a country not adjacent to the United States; and this distinction saves such foreign commerce from the effect of that section as to continuous carriage beyond the American seaboard.

Thus, the Commission has no jurisdiction over the ocean carriers transporting shipments from the United States to a foreign country not adjacent to the United States. By the plain terms of the Act, the Commission, in its control over foreign commerce to and from a country not adjacent to the United States, is limited to the regulation of such traffic from the point of origin to the port of transshipment, or from the port of entry to the point of destination. An inland movement of either export or import traffic is a condition precedent to the attachment of the jurisdiction of the Commission, and then only over such inland portion of the movement. The Act provides no machinery by which its provisions can be enforced as to oceanic transportation lines.

Prior to the supplemental legislation of 1912, known as the Panama Canal Act, approved August 24, 1912, and effective July 1, 1914, the Act to Regulate Commerce did not apply to the port-to-port traffic of water carriers. For the present jurisdiction of the Act over certain water carriers, including coastwise oceanic lines, see this volume, chapter V, section 29, "Inland Water Carriers," *ante*.

See also:

- Aransas Pass Channel & Dock Co. vs G. H. & S. A. Ry. Co.,
27 I. C. C. Rep. 403, 414.
- Augusta & Savannah Steamboat Co. vs. O. S. S. Co., 26 I. C.
C. Rep. 380, 383.
- Galveston Commercial Assn. vs. A. T. & S. F. Ry. Co., 25
I. C. C. Rep. 216, 225.
- Chamber of Commerce of New York vs. N. Y. C. & H. R. R.
Co., 24 I. C. C. Rep. 55, 74.

- Borgfeldt & Co. vs. S. P. Co., 18 I. C. C. Rep. 442, 553.
 In Re Jurisdiction over Water Carriers, 15 I. C. C. Rep. 205,
 207, 208, 211.
 Joseph Ullman vs. Adams Express Co., 14 I. C. C. Rep. 340,
 345.
 Cosmopolitan Shipping Co. vs. Hamburg-American Packet
 Co., 13 I. C. C. Rep. 266, 279.
 Lykes Steamship Line vs. Commercial Union, 13 I. C. C. Rep.
 310, 316.
 I. C. C. vs. Goodrich Co., 224 U. S. 194, 213.
 Goodrich Transit Co. vs. I. C. C. 190, Fed. Rep. 118, 123.

Compare :

- Transcontinental Commodity Rates, 32 I. C. C. Rep. 449, 457.
 Jurisdiction over Water Carriers under the Panama Canal Act,
 see Panama Canal Act.

In the course of its report, the Commission has this to say :

"It seems not inappropriate to outline briefly the mode of government of Porto Rico since its acquisition by the United States, as set forth in *Ochoa vs. Hernandez*, 230 U. S. 139.

"By Act of April 25, 1898, 30 Stat. 364, chapter 189, Congress declared that a state of war existed between this country and Spain. Porto Rico, then a colony of Spain, was occupied by the military forces of the United States under Major-General Miles on July 25, 1898. A protocol was signed in Washington, Aug. 12, 1898, 30 Stat. 1742, under which hostilities were suspended pending negotiation of a treaty for the establishment of peace. In this protocol Spain agreed to cede the island of Porto Rico to the United States and to immediately evacuate it. Commissioners were appointed to treat at Paris and proceed to the negotiation and conclusion of the treaty. Pending the negotiation of the treaty, this government by its military forces occupied Porto Rico as a colony of Spain and was bound by the principles of international law to do whatever was necessary to secure public safety, social order, and the guaranties of private property. The island, and the islands and keys adjacent and belonging to it, were by order of Oct. 1, 1898, General

Order No. 158, established as a military department. A treaty was signed at Paris, Dec. 10, 1898, and ratifications were exchanged at Washington, April 11, 1899, 30 Stat. 1754. By the terms of this treaty Porto Rico was ceded to the United States, and 'the civil rights and political status of the native inhabitants of the territory hereby ceded to the United States shall be determined by Congress.' Article IX, page 1759. The military occupation of Porto Rico was immediately followed by the establishment of a provisional government, and this government continued in control of the affairs of the island continuously until the ratification of the treaty, and thereafter until the enactment of the Foraker Act of April 12, 1900, entitled 'An Act temporarily to provide revenues and a civil government for Porto Rico, and for other purposes,' 31 Stat. 77, chapter 191.

"The civil government provided by the Foraker Act consisted of a governor and executive council, a legislature subject to the laws of Congress and courts. Provision was made for review by the Supreme Court of decisions of the highest court of Porto Rico."

Section 14 of this Act provided:

"The statutory laws of the United States not locally inapplicable * * * shall have the same force and effect in Porto Rico as in the United States.

"The Supreme Court has held that Porto Rico is an organized territory, appurtenant to, but not incorporated in, the United States."

In *American R. R. Co. vs. Birch*, 224 U. S. 547, it was held that "the Employers' Liability Act expressly applies to Porto Rico." The Safety Appliance acts were held to extend to Porto Rico in *American R. R. of Porto Rico vs. Didricksen*, 227 U. S. 145.

It was the final conclusion of the Commission that pending action by Congress in the premises it was constrained to hold that the cars, as well as the locomotives, of the

carriers in Porto Rico must be made to conform with the requirements of the Safety Appliance Acts.

In Re Safety Appliances on Equipment of Railroads in Porto Rico, 37 I. C. C. Rep. 470, 471.

(3) **Common Carriers in Hawaii.** The Interstate Commerce Commission entertains jurisdiction, under the Act, over common carriers operating within the territory of Hawaii.

(4) **Common Carriers in Philippine Islands.** The jurisdiction of the Act to Regulate Commerce does not extend over common carriers operating within the territory of the Philippine Islands.

Compare:

I. C. C. Conference Rulings Bull. No. 6, Ruling No. 389.

(5) **Common Carriers in the Panama Canal Zone.** The Interstate Commerce Commission exercises jurisdiction over common carriers operating within the Panama Canal Zone, except that Colon, although within the geographical limits of the Canal Zone, is governed by and is under the sovereignty of the Republic of Panama. The Commission has, therefore, held that shipments from the United States to Colon are entitled to export rates.

I. C. C. Conference Rulings, Bull. No. 6, Ruling No. 359.

§ 33. Lighters and Lighterage Companies.

A lighterage carrier, independently operated, but engaged in the interstate transportation of passengers or property under a common control, management, or arrangement, with a rail carrier, is subject to the Act.

Eagle Pass Lumber Co. vs. National Railways of Mexico, 25 I. C. C. Rep. 5.

Murray Lighterage & Transportation Co. vs. D. & H. Co., 25 I. C. C. Rep. 388.

Federal Sugar Refining Co. vs. B. & O. R. R. Co., 20 I. C. C. Rep. 200.

Federal Sugar Refining Co. vs. B. & O. R. R. Co., 17 I. C. C. Rep. 40, 45.

Act to Regulate Commerce as amended.

§ 34. Ocean Carriers.

Ocean carriers are not subject to the Act, and the Commission has no power to establish through routes or joint rates to destinations in a foreign country. The Commission may deal with import and export rate situations only as though the ports of entry and transshipment were destinations instead of gateways.

From a careful reading of section 1 of the Act, inartificially drawn as it is, the legislative intention is clear to bestow upon the Interstate Commerce Commission jurisdiction over such ocean carriers only as may form a connecting link in the through transportation of passengers or property internal to the United States, to an adjacent foreign country, or to and from ports of transshipment and entry either in the United States or an adjacent foreign country, when operated in connection with a railroad under a common control, management, or arrangement for a continuous carriage or shipment.

The word "adjacent," as used in the Act to modify the word "foreign," would seem to mean adjacent in the sense of a possibility of substantial continuity of rails.

§ 35. Private Car Companies.

Section 1 of the Act, by its definition of the term "transportation" to include "cars and other vehicles, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership, or of any contract, express or implied, for the use thereof," brings private car companies

within the jurisdiction of the Act when furnishing cars for or engaging in interstate transportation.

Act to Regulate Commerce, section 1.

Section 1 of the Elkins Act, providing that "it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to Regulate Commerce and the acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, or whereby any other advantage is given or discrimination is practiced," brings within the jurisdiction of the Act a private car company which delivers its cars to a common carrier subject to the Act to be furnished indiscriminately for the use of shippers, receiving from such carrier compensation for the use thereof on a mileage basis. The jurisdiction of the Commission attaches to such private car company as an agency of transportation which may be so conducted as to impair or destroy uniformity of rates, which is the substantive object to the statute.

Elkins Act, section 1, Pub. 103, app. Feb. 19, 1903.

I. C. C. vs. Reichman, 145 Fed. Rep. 235.

I. C. C. Ann. Rep. for 1904, "Private Car Monopolies."

See also:

Ellis vs. I. C. C., 237 U. S. 434, 59 L. Ed.

Pa. Paraffine Works vs. P. R. R. Co., 34 I. C. C. Rep. 179, 193.

Vulcan Coal & Mining Co. vs. I. C. R. R. Co., 33 I. C. C. Rep. 52.

A. T. & S. F. Ry. Co., U. S., 232 U. S. 199.

Arlington Heights Fruit Exchange vs. Southern Pacific Co., 20 I. C. C. Rep. 106.

Chappelle vs. L. & N. R. R. Co., 19 I. C. C. Rep. 56, 59.

Chappelle vs. L. & N. R. R. Co., 19 I. C. C. Rep. 456.

Carr vs. No. Pac. Ry. Co., 9 I. C. C. Rep. 1, 12.

Worcester Excursion Car Co. vs. Penn. R. R. Co., 3 I. C. C. Rep. 577, 2 I. C. Rep. 792.

§ 36. Purchasers and Successors of Common Carriers.

The purchasers or successors of common carriers subject to the Act remain under the jurisdiction of the statute so long as such common carrier is subject to the regulating authority.

It would indeed be lamentable, said the court, if a lawful order against unjust discrimination, made by the Interstate Commerce Commission after a protracted investigation, could be nullified by the subsequent reorganization of the company, or transfer of its railroad and franchises to another corporation. It is a settled principle that the purchaser of property in litigation, *pendente lite*, is bound by the judgment or decree in the suit.

I. C. C. vs. W., etc., R. R. Co., et al., Fed. Rep. 192.

§ 37. Trustees and Receivers of Common Carriers.

The text of the statute recognizes two classes of common carriers, namely natural persons and corporations. It contemplates receivers of railroads as persons in charge of the affairs of such carriers without reference to their official relation to the court appointing them.

Barnes on Interst. Transportation, section 51, page 111, citing 8th Ann. Report of I. C. C., for 1895, and Beach on Receivers.

The principle that the receiver as an officer of the court appointing him is subject only to the authority of such court is modified as to many of his duties by the Act to Regulate Commerce, and other federal statutes, and offers no impairment of the jurisdiction of the Commission.

Act to Regulate Commerce, secs. 1, 6, 9, 10, 16 and 20.
Elkins Act, sec. 1.

Arbitration Act, section 1.

Removal of Causes Act, sections 3, 24 St. at L., 554. Amend.
of 1888, C. 886, section 3, 25 St. at L. 436.

See also:

Beach on Receivers.

It is very clear from all the authorities, as well as from the reason of the matter, that the attitude of a receiver to the Act to Regulate Commerce is precisely that of the attitude of the corporation whose affairs have not been taken possession of by the court. The business performed is public. It is, as has been stated and shown so many times, the administration of public functions. The managers of railroads, whether they are owners or receivers, are putting in operation a function of the government, and the mere fact of sequestration of the property and the appointment of receivers for the benefit of creditors does not exonerate a management from performing the public duties according to the rules and regulations which the statutes may prescribe for such business.

Barnes on Interst. Transportation, section 51, page 114, citing the Ann. Report of I. C. C., for 1895.

Where carrier corporations are subject to the Act, their receivers are subject to its prohibitions, requirements, and regulations.

Indep. Ref. Assn. vs. W., etc., R. R. Co., et al., 6 I. C. C. Rep. 378.

Where a receiver of a carrier subject to the Act has been appointed, prior leave of the court appointing him is not necessary to entitle the shipper to bring complaint against such receiver before the Commission, nor is it necessary to give the Commission jurisdiction of such proceeding.

May vs. McNeill, Receiver, 6 I. C. Rep. 250.

When the line of a carrier subject to the Act is operated by a receiver or trustee, both the carrier and its receiver or trustee should be made defendants in cases involving transportation over such line.

Rules of Practice before Commission, Rule 11.

A receiver or trustee has the same right to question the Commission's order as to its validity, or interpose the same defense to the proceeding, as the carrier itself.

Farmers' L. & T. Co. vs. Nor. Pac. Ry. Co., 83 Fed. Rep. 249.

§ 38. Lessees of Common Carriers.

By leasing its road, a common carrier subject to the Act cannot remove itself from the prohibitions, requirements, and penalties of the Act, nor in pending proceedings claim exemption during the tenure of such lease. The jurisdiction of the Act attaches to the lessee to the same extent that it does to the carrier leasing its property.

Independent Rfrs. Assn. vs. Western N. Y. & P. R. R. Co., 6 I. C. C. Rep. 378.

Compare :

Western N. Y. & P. R. R. Co. vs. Penn. Refining Co., 137 Fed. Rep. 343, 356, 70 C. C. A. 23, holding that where a railroad company subject to the Act leases its line to another company the lessor company is not liable in damages under section 8 of the Act for violations of law by the lessee company.

§ 39. Sleeping Car Companies.

By amendment of June 29, 1906, sleeping car companies were specifically brought within the jurisdiction of the Act.

Act to Regulate Commerce, section 1.

The Pullman Company, which is a sleeping car com-

pany, is a common carrier and subject to the jurisdiction of the Act.

Kurtz vs. Pennsylvania Co., 16 I. C. C. Rep. 410.

See also:

Pullman Co. vs. Linke, 203 Fed. Rep. 1017, 1019.
Corporation Commission of Oklahoma vs. A. T. & S. F. Ry.
Co., 25 I. C. C. Rep. 120.

§ 40. State Railroads Engaged in Interstate Transportation.

When a state carrier engages in interstate commerce, it becomes a national instrumentality for the purpose of such commerce and is subject to the regulations prescribed by the national authority.

Barnes on Interst. Transportation, section 33, page 86, paragraph 1.

The extent to which participation in shipments originating at, or destined for, other states is sufficient to bring within the Act a carrier whose line is situated wholly within one state, seemed to produce some confusion in the earlier decisions of the courts and the Commission. This was mainly due to the somewhat ambiguous language used in section 1 of the Act, reading as follows:

"That the provisions of this Act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment)."

This provision of the law remained unchanged from time of the original enactment in 1887 up to June 29, 1906, when, by the Hepburn Act, the parentheses, as indicated

in the foregoing quotation, were inserted. This language has been recently said to indicate the intention of Congress to be:

First. To apply the Act to all railroad carriers engaging in interstate transportation.

Second. To apply the Act to such interstate transportation partly by railroad and partly by water when, and only when, both the railroad and the water are used by the respective carriers under a common control, management, or arrangement for a continuous carriage or shipment.

Moore on Interst. Commerce, section 25, page 55, referring to concurring opinion of Comr. Cockrell, in re Jurisdiction over Water Carriers, 15 I. C. C. Rep. 205, 212.

See also:

Hood & Sons vs. Delaware & Hudson Company, 17 I. C. C. Rep. 15.
In re Transportation by C. & O. Ry. Co. et al., 21 I. C. C. Rep. 207.

(1) Rulings Respecting State Carriers Prior to the 1906 Amendment to the Act to Regulate Commerce. A state common carrier when operating under arrangement for continuous carriage of interstate traffic was subject to the provisions of the Act.

Heck vs. East Tenn. V. & G. Ry. Co., 1 I. C. C. Rep. 495, 1 I. C. Rep. 775.
Mattingly vs. Pa. Co., 3 I. C. C. Rep. 592, 2 I. C. Rep. 806.
Boston Fruit and Produce Exchange vs. N. Y. & N. E. R. R. Co., 4 I. C. C. Rep. 664, 667, 3 I. C. Rep. 493.
Pa. Millers', etc., Assn. vs. P. & R. Ry. Co., 8 I. C. C. Rep. 531.
Augusta S. R. Co. vs. Wrightsville R. Co., 74 Fed. Rep. 522.

As to what constituted evidence of arrangement for continuous carriage, see:

L. & N. R. R. Co. vs. Behlmer, 175 U. S. 648, 20 Sup. Ct. 209,
44 L. Ed. 310.

- Cinn., etc., Ry. Co. vs. I. C. C., 162 U. S. 184, 16 Sup. Ct. 700, 40 L. Ed. 935, affirming same case, 13 U. S. App. 730, same case, 56 Fed. Rep. 925, same case, 4 I. C. C. Rep. 744, 3 I. C. Rep. 682.
- T. & P. Ry. Co. vs. Clark, 4 Tex. Civ. App. 611, 23 S. W. 698.
- R. R. Com., etc., vs. Clyde S. S. Co. et al., 5 I. C. C. Rep. 324, 4 I. C. Rep. 120.
- Phelps & Co. vs. T. & P. Ry. Co. et al., 6 I. C. C. Rep. 36, 4 I. C. Rep. 363.
- Frt. Bu. of Cinn. vs. Cinn., etc., Ry. Co. et al., 6 I. C. C. Rep. 195, 233, 4 I. C. Rep. 592.
- U. S. vs. Seaboard Ry. Co., 82 Fed. Rep. 563.
- U. S. vs. Standard Oil Co., 155 Fed. Rep. 305.
- U. S. vs. N. Y. C., etc., R. R. Co., 153 Fed. Rep. 630.

By participating in through movement of interstate traffic, although its own movement was performed wholly within the state, a carrier whose railroad was wholly within the limits of the state became subject to the Act.

- Baer Bros., etc., vs. Mo. Pac. Ry. Co., 13 I. C. C. Rep. 329.
- Nollenberger vs. M. P. Ry. Co. et al., 15 I. C. C. Rep. 595.
- U. S. vs. Standard Oil Co. of Ind., 155 Fed. Rep. 305.

Every part of every transportation of articles of commerce in a continuous passage from a commencement in one state to a prescribed destination in another was a transaction of interstate commerce. Every carrier who transported such goods through any part of such continuous passage was engaged in interstate commerce, whether the goods were carried upon through bills of lading or were rebilled by the several carriers.

- Barnes Interst. Transportation, section 33, page 88, citing Wilson vs. Rock Creek Ry., etc., 7 I. C. C. Rep. 83.

Any corporation which engaged in interstate commerce as defined by the Act subjected itself to all the provisions of the Act and all other regulative provisions relating thereto constitutionally prescribed by the Congress.

- Cassatt vs. Mitchell C. & C., 150 Fed. Rep. 32.

A state railroad, or other railroad not otherwise subject to the Act, if it engaged in the transportation of express matter for an express company that was subject to the Act, subjected itself to the Act in relation to such express traffic.

I. C. C. Conf. Rulings, Bull No. 6, Ruling No. 197.

Prior to the amendment of June 29, 1906, state railroads were not held to be subject to the jurisdiction of the interstate commission unless they handled traffic, even though such traffic were interstate in character, under a common control, management, or arrangement for a continuous carriage or shipment of interstate commerce, but since the above mentioned amendment, the statute holds any carrier, state or otherwise, which engages in the movement of articles of commerce from a point in one state to some point in a different state, even though such carrier performs its part of such service wholly within the state in which it operates and not under a through bill of lading, is subject to the provisions of the statute.

Leonard vs. Kl. C. S. Ry. Co. et al., 13 I. C. C. Rep. 573.
In re Transportation by C. & O. Ry. Co., et al., 21 I. C. C. Rep. 207.
C. N. O. & T. Ry. Co. vs. I. C. R., 162 U. S. 184.

See also:

Kanotex Refining Co. vs. A. T. & S. F. Ry. Co., 34 I. C. C. Rep. 271.
T. & N. O. R. R. Co. vs. Sabine Tram. Co., 227 U. S. 111.
Ohio R. R. Comm. vs. Worthington, 225 U. S. 101.
So. Pac. Terminal Co. vs. I. C. C., 219 U. S. 498.

Compare:

C. M. & St. P. Ry. Co. vs. Iowa, 233 U. S. 334.
G. C. & S. F. Ry. Co. vs. Texas, 204 U. S. 403.

§ 41. Street Railways Within the District of Columbia.

The District of Columbia bears the same relation to the federal government as a city sustains to the state legislature.

U. S. vs. McFarland, 20 App. D. C. 552.

It is in that sense a municipal corporation possessing no legislative power and over which the plenary power of Congress is supreme.

Cohens vs. Virginia, 6 Wheat. (U. S.) 264, 5 L. Ed. 257.

In the Employers' Liability cases the Supreme Court said that "the legislative power of Congress over the District of Columbia is plenary and does not depend upon the special grant of power such as the commerce clause of the Constitution."

Employers' Liability Cases, 207 U. S. 463, 28 Sup. Ct. 141.
Barnes Interstate Transportation, section 30, page 76.

Section 1 of the Act to Regulate Commerce subjects to its provisions all carriers within the District of Columbia engaged in the transportation designated in the Act.

Act to Regulate Commerce, section 1.

Prior to the enactment of the District of Columbia Public Utilities Law, the District of Columbia Street Railways Act of 1908, regulating street railways within the District of Columbia, conferred upon the Interstate Commerce Commission jurisdiction and authority to enforce obedience to its provisions and required such street railways to comply with the orders of the Commission.

Dist. of Columbia St. Rys. Act, approved May 23, 1908, Pub. No. 134, 35 Stats. L. 246.

Since 1912 public utilities within the District of Columbia have been under the jurisdiction and authority of the

Public Utilities Commission of the District of Columbia, which body reports direct to Congress.

Public Utilities Act of D. C., Pub. No. 435, approved March 4, 1913.

§ 42. Terminal and Belt Railroads Engaged in Handling Interstate Traffic.

A belt or terminal railroad is a line or lines of railway constructed generally in and about a large city, terminal, or shipping center, to form a connection between different lines of railroad, and having connections, by switch or otherwise, with the lines of railway entering and leaving such point or terminal, for the purpose of unifying the service and expense of the interchange of traffic between the lines at such point or terminal. Such belt or terminal railroads may be owned subsidiarily or by one or more of the lines entering or leaving such terminal or point as a part or parts of their system or systems, or as an independent corporation.

Portland Lumber Co. vs. O.-W. R. R. Co., etc., 21 I. C. C. Rep. 292.

A belt or terminal railroad engaged in the transportation of property moving from a point in one state to a point in another state is "as much subject to the Act as though it owned and operated all the line of railroad connecting the points in different states between which moved the commodities mentioned."

U. S. vs. Illinois Terminal Rd. Co., 168, Fed. Rep. 546.
I. C. C. Conf. Rulings, Bull. No. 6, Ruling No. 312.

A belt or terminal railroad receiving shipments of interstate freight moving under through bills of lading to or from industries on its line, subjects its line to an act of common control for a continuous shipment within the meaning of section 1 of the Act.

Interst. S. Y. Co. vs. Indpls. Un. Ry. Co., et al., 99 Fed. Rep. 472.

Note—Since the amendment of 1906, the through bill of lading would not be essential, as the test of application of the authority of the Act is the character of the transportation and the service the public may demand rather than the manner in which the transportation service is performed. Much of the authority applicable to state carriers participating in interstate traffic is likewise applicable to terminal and belt railroads in the determination of when the jurisdiction of the Act begins.

Where a holding company controls an extensive system of railroads, including a terminal company which operates certain wharves and docks, both the holding company and the terminal company are proper parties to a proceeding involving a question of discrimination where a preference is charged through the leasing to a favored shipper by the terminal company of certain property, although neither said holding nor terminal company, considered alone, came within the definition of a common carrier, but the terminal company is a necessary element in and facility of the interstate transportation in which the entire system controlled by the holding company was engaged, and to the extent such transportation was interstate, the statutory jurisdiction of the Commission obtains.

Eichenberg vs. So. Pac. Co., 14 I. C. C. Rep. 250.

The rule that "the movement of freight from a point in one state to a point in another state by rail must be regarded as an entirety and every railroad participating in that movement thereby becomes subject to the Act to Regulate Commerce, even though its service is performed entirely within a single state," applies to a belt or terminal railroad participating in the movement of interstate traffic.

Leonard vs. K. C. S. Ry. Co., 13 I. C. C. Rep. 573.

The duty of regulating terminal charges, when related to traffic between the states, has been lodged with the Commission, and a statute of a state prescribing certain terminal charges with respect to interstate traffic is not controlling.

Wilson Prod. Co. vs. Penna. R. R. Co., 14 I. C. C. Rep. 170.

A belt or terminal railroad, independently operated, as a state railroad, would become subject to the provisions of the Act if it engages in interstate commerce, although it enters into no arrangement with any other carrier by rail or water for the movement of traffic between such points on its line and points without the state.

Leonard vs. K. C. S. Ry. Co., 13 I. C. C. Rep. 573.

In re question, "Is a belt line owned by a municipality, which participates in interstate movements, subject to the jurisdiction of the Act and of the Commission?" the Commission held it was subject to such jurisdiction.

I. C. C. Confr. Rulings, Bull. No 6, Ruling No. 89, page 24.

See also this volume, chapter V, section 27, "Municipal Ferries."

(1) **Industrial Railways.** In its original report in the Industrial Railways Case, the Commission made no distinction between the industrial roads, although their physical characteristics and conditions surrounding them varied widely. It held these roads to be merely plant facilities and not common carriers, following the rule laid down in the original Tap Line Cases before the Commission. Subsequent to the decision of the Supreme Court in the Tap Line Cases, the Commission modified its previous ruling in the Industrial Railways Case to permit the trunk line roads, if they so elected, to arrange by agreement divisions of rates with any industrial railroads

which are common carriers under the test applied by the Supreme Court in the Tap Line Cases. The question involved was whether the industrial railways were common carriers and therefore amenable to the Act to Regulate Commerce.

The Commission in its supplemental report divided the industrial railways into six groups.

The first group included such industrial railways as had a very general merchandise and commodity traffic aside from the traffic of the controlling industries. They were of the trunk line type; performed hauls ranging from 11 to 380 miles. These lines were common carriers within the Supreme Court test.

The second group was of lines extended from lumber mills to junctions of the trunk line carriers and were, in reality, tap lines. These lines also in all respects fell within the principles laid down by the Supreme Court in the Tap Line Cases, except that in the Tap Line Cases the tap lines were all located within the producing territory from which the trunk lines applied a blanket rate to all important markets, whereas within the second group no large blanket existed, the rates on lumber being graded with some regard to distance. In the case of short-haul traffic in this territory some recognition was given to the two-line hauls involved from points on the tap lines.

The third group of lines included those, the physical operations of which were, in all respects, similar to those involved in the **General Electric Co., Solvay Process Co., Crane Iron Works, and Alan Wood, Iron & Steel Co.** cases, the only essential difference being that the lines in the third group were incorporated and held themselves to be common carriers. Again, the Supreme Court test in the Tap Line Cases was used to determine the character

of the common carrier, that test being that, "it is the right of the public to use the road's facilities and to demand service of it rather than the extent of its business, which is the real criterion determinative of its character."

The fourth group of lines resembled the lumber tap lines with the important exception that they hauled commodities other than lumber, and thus, in some instances, fell under the direct inhibition of the commodities clause.

In the fifth group were placed plant facilities. An industry had plant tracks which could under no conceivable conditions be considered as having any common-carrier characteristics. In order to give to them such a status, a railroad was incorporated, the tracks of the plant leased to it, and the trunk line granted trackage rights and even leased its rails to the industrially owned railroad corporation. The industrial railroad thereupon published tariffs, filed them with the Commission, made reports, and as a matter of form assumed the appearance of a common carrier subject to the Act, thereby deriving from the trunk line, divisions out of the rate applicable to the locality for the same service which the industry had previously performed without compensation. This practice, the Commission condemned as unquestionably a device to give an undue advantage to the shipper.

The sixth group was composed of industrial plant tracks which were neither owned nor operated by common carriers and which were not dedicated to public use, the ownership and right of use being in the controlling industries which operated them. This group of lines sought allowances out of the locality basis of rates under section 15 of the Act, based on the theory that they were performing a service of transportation which the trunk line was obligated to perform under the rate structure. The Commission in this connection called attention to the "passing of

the necessity for the provision of section 15 under which shippers may be compensated by the trunk lines for their facilities used in the handling of their own shipments. This legislative measure was enacted to give this Commission a means of eliminating certain unjust discriminations. The gradual elimination of discriminatory practices by other processes leaves this provision of the law to be used as a cloak for various payments which but for it would be looked upon as rebates."

The Commission said further:

"Because of the varying nature of the operations of the industrial lines and because each of them must be treated on the particular facts pertaining to it, it is proper that we point out the principles and decisions which must guide those desiring to enter into joint rate arrangements and the limitations within which such arrangements may be made. There must be determined with respect to each of the lines, first, whether the instrumentality performing the service is a bona fide common carrier; second, whether the service which it performs between the point of interchange with the trunk line and point of placement on the line of the industrial road is plant service or public transportation; third, whether a charge should be made for such service in addition to the line-haul rate applicable to or from points on the rails of the trunk line at the junction. With these questions there is to be considered the larger economic problem whether part of the money paid to the trunk line carriers for public transportation service is to be used to defray the expense of particular shippers in conveying their traffic to and from the terminals of the trunk line carriers. The **Industrial Railways Case** rests largely upon the principle of placing the cost of service where it properly belongs. In approaching the question whether the common carrier status of an industrial line is bona fide it must be borne in mind that there

are interests of the industry beyond the mere question of rates in maintaining such a status. The recognition of such lines as common carriers in the association of railroads through which the interchange of cars is provided inures to the very great advantage of the controlling industry served by such a line in the way of remission of charges for the detention of cars. In our original report on the **Industrial Railways Case** this matter was fully discussed."

Second Industrial Rys. Case, 34 I. C. C. Rep. 596, 600.

A. T. & S. F. Ry. Co. vs. Kans. City Stk. Yds. Co., 33 I. C. C. Rep. 92.

In re Joint Rates with the Birm. Sou. Ry. Co., 32 I. C. C. Rep. 110.

Mfrs. Ry. Case, 32 I. C. C. Rep. 100.

Industrial Rys. Case, 32 I. C. C. Rep. 129, 130.

Tap Line Cases, 234 U. S. 1.

U. S. vs. B. & O. R. R. Co., 231 U. S. 274.

I. C. C. vs. Diffenbaugh, 222 U. S. 42.

I. C. C. vs. Stickney, 215 U. S. 98, 105.

Compare:

Alan Wood Iron & Steel Co. vs. P. R. R. Co., 22 I. C. C. Rep. 540.

Cancellation Joint Rates in connection with C. Z. & G. R. R. Co., 27 I. C. C. Rep. 353.

Industrial Rys. Case, 29 I. C. C. Rep. 212.

Crane Iron Wks. vs. C. R. R. of N. J., 17 I. C. C. Rep. 514, (affirmed) Crane vs. U. S. 209 Fed. Rep. 238.

Solvay Process Co. vs. D. L. & W. R. R. Co., 14 I. C. C. Rep. 246.

Gen. Elec. Co. vs. N. Y. C. & H. R. R. R. Co., 14 I. C. C. Rep. 237.

See also:

Second Industrial Rys. Case, 37 I. C. C. Rep. 408, 491, 497, 558, 566.

Second Industrial Rys. Case, 38 I. C. C. Rep. 316.

Industrial Rys. Case, 38 I. C. C. Rep. 510.

Industrial Rys. Case, 39 I. C. C. Rep. 312.

Second Industrial Rys. Case, 41 I. C. C. Rep. 68.

Industrial Rys. Case, 41 I. C. C. Rep. 53.

Second Industrial Rys. Case, 41 I. C. C. Rep. 46.

Second Industrial Rys. Case, 41 I. C. C. Rep. 42.

(2) **Tap Lines.** Tap lines or industrial railroads affiliated with lumber companies have several times been

before the Interstate Commerce Commission on the question of their status as common carriers subject to the Act to Regulate Commerce. Defining what is a tap line, the Commission said:

“Originally it was usual to refer to all the rails used in a lumber mill operation as a ‘logging road,’ but since the practice of making allowances to the lumber companies west of the Mississippi River has crept in, and more particularly within the last four or five years, the rails leading from the mill to or through the timber, and usually to a logging camp or company town, have come to be known as the main line or ‘tap line.’ The spurs radiating into the forest from that point or from other points along the main line are now usually referred to as the ‘logging road.’ ”

The tap lines, in their physical characteristics and relation to the proprietary lumber companies, differed materially. A difference in practice on the two sides of the Mississippi River was in vogue. The railroads west of the Mississippi made certain allowances to the mills which had “logging roads” which was called a “tap-line allowance or division.” The mills east of the river, although having logging roads, were made no such allowance. The Supreme Court, in the Illinois Central R. R. Case, declared that no reason appeared for such allowance west of the Mississippi which did not apply east of that river, and that it amounted to a rebate or reduction from the regularly published rate giving an advantage to the mills west of the Mississippi over those east, although the published rates from both were the same.

The Commission, in general, declared the tap lines involved in the original investigation to be merely plant facilities and not common carriers. It held that while a common ownership of an industry and a short line serving it was not in itself sufficient to divest the railroad of its

status as a common carrier, on the other hand, the fact that the rails, locomotives, and cars of an industry had been turned over to an incorporated railroad company owned and operated by the industry or in its interest, did not divest those appliances of their character as a plant facility if such in fact was the case.

In other words, the Commission sought to distinguish between what is transportation and what is industry, and between a facility of transportation and a plant facility or tool of the industry, treating each case, however, on its own merits.

Its general conclusion was that the service performed for the proprietary lumber companies by certain tap lines, then before the Commission, was not a service of transportation by a common carrier.

The Supreme Court, in reviewing the Commerce Court decision in the Tap Line Cases, held that the test of common carriage was the right of the public to use the railroad's facilities and to demand service of it rather than the extent of its business, and held the five tap lines which had appealed, to be common carriers with respect to both proprietary and non-proprietary traffic. Applying the rule thus laid down by the Supreme Court, the Commission has, upon the facts in each individual case, determined the status of tap lines throughout the country, holding those tap lines of which the public has a right to use the road's facilities and demand service, to be common carriers, and in so far as they participate in interstate transportation, to be subject to the Act to Regulate Commerce.

Tap Lines Cases, 234, U. S. 1.
Tap Line Case, 31 I. C. C. 490.
Tap Line Case, 34 I. C. C. 116.
Tap Line Case, 35 I. C. C. 485.

See also:

O'Keefe Tap Line Case, 240 U. S. 294.

Caddo River Lumber Co. vs. C. & C. R. R. Co., 38 I. C. C. Rep. 330.

Union Lumber Co. vs. G. C. & S. F. Ry. Co., 37 I. C. C. Rep. 225.

Black & White River Transp. Co. vs. M. P. Ry. Co., 37 I. C. C. Rep. 244, 246.

Ladd & Co. vs. Gould Southwestern Ry. Co., 36 I. C. C. Rep. 179, 183.

(3) **Plant Facilities.** The determination of the status of an industrial railroad, either as a common carrier or a plant facility, amounts to looking to the substance of the service and not to its form. A plant facility may be generally defined as the instrumentalities—such as storage and switching tracks, locomotives, electric motors, and in some instances, special cars—operated as a part of an industrial plant.

In the General Electric Co. Case the plant facilities consisted of 12 miles of broad gauge switching tracks and 7 miles of narrow gauge electric tracks, electric motors, engines, and a crew of men to operate these instrumentalities. The test of the status of these plant facilities, originally applied by the Commission, was that used in the original Tap Lines investigation, but since then the Supreme Court has ruled that the criterion determinative of the character of the industrial railroad as a common carrier is the right of the public to demand service of it and not the extent of its business as a plant facility.

Plant facilities as such, of course, are not subject to the Act to Regulate Commerce. It is only when the industrial railroad, although it may perform a plant service as to proprietary traffic, becomes a common carrier under the Supreme Court test, that the jurisdiction of the Act takes effect.

Plant facilities of this character are divisible into two

general classes, (1) those which are incorporated as common carriers, and (2) those which are not incorporated as common carriers, nor dedicated to public use.

In the case of the incorporated plant facilities the procedure of creation was to incorporate a railroad, lease such tracks as belonged to the plant to the incorporated railroad and procure from the trunk line trackage rights and leases of its rails, and thereupon to file tariffs with the Interstate Commerce Commission and make reports thereto by the incorporated company; thus, as a matter of form, assuming the appearance of a common carrier subject to the Act. The purpose of this procedure was to procure from the trunk line divisions out of the rates applicable to the locality for the same service which the industry had previously performed without compensation. For a trunk line carrier to offer its facilities by lease or by trackage rights and thereby give an undue advantage to a single shipper was condemned by the Commission as in contravention of the provisions of the Act to Regulate Commerce. The attempt of these industrial plant systems to procure allowances out of the locality basis of rates under section 15 of the Act to Regulate Commerce was denied by the Commission, and such action by the Commission is in no wise repugnant to the holding of the Supreme Court in the Tap Line Cases, *supra*, which said:

“* * * If the service is public transportation defendant may be compensated, even though it be not a common carrier. Railroads are not required to own all of the instrumentalities required for the performance of the service which they are bound or undertake to perform. They may also lease or hire suitable facilities or discharge a part of their duties through agents and without restriction as to the public or private status of such agents or of the owners of the instrumentalities procured. The only restriction is that

contained in section 15 of the Act to the effect that allowances to shippers for furnishing transportation or instrumentalities thereof shall be supervised by the Commission."

The extent of the right of an industry to be allowed compensation under section 15 of the Act for the services and facilities rendered by it to the trunk lines and common carriers subject to the Act, through its plant facilities, is a question solely within the jurisdiction of the Act and the authority of the Commission, but beyond this point the present system of regulation does not reach to plant facilities and their operation.

See, also, citation of cases in this section, **sub-(1)**, "Industrial Railways," and **sub-(2)**, "Tap Lines."

Compare:

- A. T. & S. F. Ry. Co. vs. Kansas City Stk. Yds. Co., 33 I. C. C. Rep. 92.
- Associated etc., Los Angeles vs. A. T. & S. F. Ry. Co., 18 I. C. C. Rep. 310, 313.
- Crane Iron Wks. vs. C. R. R. Co. of N. J., 17 I. C. C. Rep. 514.
- Solvay Process Co. vs. D. L. & W. R. R. Co., 14 I. C. C. Rep. 246.
- Gen. Elec. Co. vs. N. Y. C. & H. R. R. Co., 14 I. C. C. Rep. 237. (Affirmed) Crane Iron Works vs. U. S., 209 Fed. Rep. 238.

In this connection it is well to note the rulings of the Supreme Court of the United States in the Newcastle (236 U. S. 351) and Pacific Coast Switching Cases, the latter being commonly known as the Los Angeles Switching Case.

In **Pennsylvania Co. vs. U. S.**, 236 U. S. 351, the court held that the term "transportation," as used in the Act to Regulate Commerce, "covers the entire carriage and service in connection with the receipt and delivery of property transported."

In the **Pacific Coast Cases**, 234 U. S. 294, and 234 U. S. 315, the court held that the delivery and receipt of goods

within the switching limits of a city is not necessarily an additional service for which a carrier may make an additional charge, but that it is a question of fact for the Commission to determine whether such delivery and receipt is an additional service or whether it is merely a substituted service which is substantially a like service to that included in the line-haul rate.

Attention is called to these two decisions merely for the purpose of pointing out the effect of these rulings on the extent to which the plant facility might be used in accomplishing the receipt or delivery of freight which is, in reality, a part of the "transportation" which carriers are required to afford under the provisions of the Act, thus effecting the right of the proprietary shippers and receivers of freight to receive allowances under section 15 of the Act.

§ 43. Jurisdiction of the Commission Not Affected by Nature of Organization of Carrier.

Section 1 of the Act applies the jurisdiction of the Act to "any common carrier or carriers," and makes no distinction as to the nature of the carrier's organization, corporate or otherwise. Any common carrier, whether operated as a corporation, stock company, partnership, or by individual ownership, is subject to the provisions of the Act when it engages in the character of transportation designated in the statute.

American Bankers' Assn. vs. Am. Ex. Co. et al., 15 I. C. C. Rep. 15.

Congress has power to charter a railroad company, and such federally incorporated carrier is subject to the jurisdiction of the Act and of the Commission.

Pacific R. Cases, 115 U. S. 2, 29 L. Ed. 319.
Calif. vs. Pac. R. R. Co., 127 U. S. 1, 32 L. Ed. 150.

Decker vs. R. R. Co., 30 Fed. Rep. 723.

Raworth vs. No. Pac. R. R. Co., et al., 5 I. C. C. Rep. 234, 3 I. C. Rep. 857.

Mer. Un. of Spokane Falls vs. No. Pac. R. R. Co., 5 I. C. C. Rep. 478, 4 I. C. Rep. 183.

§ 44. Kinds of Transportation Subject to the Act.

In the language of section 1 of the Act to Regulate Commerce, the transportation service of the common carriers made subject thereto, is generally described as the transportation of persons and certain named kinds of property from one state or territory of the United States or the District of Columbia to any other state or territory of the United States or the District of Columbia, or from one place in a territory to another place in the same territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or in an adjacent foreign country.

§ 45. Movement in Transportation Conclusive.

And in specific movement from any point in a state of the United States

To any point in another state of the United States.

To any point in a territory of the United States.

To any point in the District of Columbia.

To any point in the same state, but passing through an adjacent state, territory, or foreign country.

From any point in a territory of the United States

To any point in a territory of the United States.

- To any point in another territory of the United States.
- To any point in a state of the United States.
- To any point in the District of Columbia.
- From any point in the District of Columbia
 - To any point in a state of the United States.
 - To any point in a territory of the United States.
 - To any point in the District of Columbia.
- From any point in the United States
 - To an adjacent foreign country.
 - To any other point in the United States passing through a foreign country.
 - To the port of transshipment where traffic is destined to a foreign country.
- From port of entry in the United States, or an adjacent foreign country, of traffic from a foreign country to any point in the United States.

The "Territories" and "District of Columbia," for jurisdictional purposes, should be treated as "States" as that word is used in the "Commerce Clause of the Constitution of the United States."

Hanley vs. K. C. S. Ry. Co., 187 U. S. 617, 23 Sup. Ct. 214, 47 L. Ed. 333.

Stoutenburgh vs. Hennick, 129 U. S. 141, 9 Sup. Ct. 256, 32 L. Ed. 637.

Matter of Wilson, 10 N. M. 32, 60 Pac. 73, 48 L. R. A., 417.

§ 46. Differences Between Interstate Carriers and Interstate Transportation.

There is a pertinent distinction between an interstate carrier and interstate transportation. The carrier becomes an interstate carrier by reason of its participation in the movement of interstate commerce. The movement as an entirety, of the thing transported from a point in one state

to a point in another state characterizes it as interstate transportation. The carrier is but a means of interstate transportation or movement of interstate commerce, as contradistinguished from the movement itself of the thing transported. While, to the lay mind, this distinction may appear anomalous, nevertheless it is essential to a comprehensive analysis of the jurisdiction of the Act to Regulate Commerce and the acts amendatory thereof and supplementary thereto, over the movement of the thing transported and over the means or instrumentality by which its transportation is accomplished. The movement or transportation function may involve several independent carriers, each performing its individual portion of the service, but the character of the transportation itself is determinable from its movement as an entirety from its original point of origin to its ultimate point of destination. Thus, if the movement, as an entirety, is from a point in one state to a point without the state, the transportation is interstate in character.

This distinction failed, however, prior to the amendment of 1906, for, under the interpretation by the courts of the clause "wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management, or arrangement, for a continuous carriage or shipment," the manner in which the transportation was conducted determined its amenability to the Act rather than the character of the transportation itself.

Since the removal of the ambiguity in this language of the original Act, the character of the transportation controls instead of the manner of its performance. Thus, except as to transportation partly by rail and partly by water, the common arrangement test has no application. A rail carrier, not otherwise subject to the provisions of the Act, becomes subject to the Act the moment it engages

in or becomes a party in the transportation of interstate commerce, whether it does so by "a common control, management, or arrangement for continuous carriage or shipment."

§ 47. Interstate and Foreign Commerce Subject to Act.

It was clearly the original intent and purpose of Congress to make all interstate transportation wholly by railroad, and such interstate commerce as might be transported partly by railroad and partly by water, subject to the Act, but only when such latter carriage was had under a common control, management, or arrangement between the rail and water carriers for a continuous carriage or shipment.

In the Matter of Jurisdiction over Water Carriers, 15 I. C. C. Rep. 205.

Foreign commerce in transportation is not subject to the Act, except when moving to or from an adjacent foreign country, and then only as to the part of the transportation performed within the United States.

The Supreme Court in referring to the provisions of section 1 of the Act relating to foreign commerce, said: "It would be difficult to use language more unmistakably signifying that Congress had in view the whole field of commerce (excepting commerce wholly within a state) as well that between the states and territories as that going to or coming from foreign countries."

Import Rate Case, 162 U. S. 197, 40 L. Ed. 940 (1896).

The Commission's jurisdiction covers that part only of through import or export rates which apply to the inland haul.

Re Relative Export and Domestic Rates, 8 I. C. C. Rep. 214, (see also: 10 I. C. C. Rep. 55).

An inland movement, by rail, or by rail and water, of import or export traffic, submits the transportation of such foreign commerce to the jurisdiction of the Commission.

Cosmopolitan Shipping Co. vs. Hamburg-American Packet Co., 13 I. C. C. Rep. 266.

The transportation or transmission of messages within the District of Columbia or between points within a territory of the United States is not subject to the Act. The Act as to telephone, telegraph, and cable messages reads: "from one state, territory, or district of the United States to **any other** state, territory, or district of the United States."

Act to Regulate Commerce, section 1.

§ 48. Transportation of Foreign Traffic Between the United States and Adjacent Foreign Country.

The Act does not purport to regulate foreign commerce while within an adjacent foreign country, at foreign ports, nor on the high seas. It does apply, however, to all foreign commerce as soon as it comes through a port of entry in the United States upon through bills of lading destined to a place in the United States, and the transportation thereof within the United States is performed either by a rail carrier, or partly by rail and partly by water carriers, and to such foreign commerce as comes through a port of entry in an adjacent foreign country upon through bills of lading destined to a place in the United States, and the transportation of which is performed by a rail carrier, or partly by rail and partly by water carriers, and with like effect to such foreign commerce moving from points within the United States to points or ports of transshipment in adjacent and distant foreign countries in the reverse direction.

It may be broadly said that as soon as the foreign commerce enters, or while it remains within the territorial jurisdiction of the United States, it is subject, in like manner as purely interstate traffic, to the provisions of the Act.

N. Y., etc., vs. P. R. R. Co. et al., 4 I. C. C. Rep. 447, 3 I. C. Rep. 417.

The jurisdiction of the Act applies exclusively to the part of the transportation wholly within the United States—from point of origin in the United States to the port of transshipment, in case of export, and from port of entry to point of destination either in the United States or an adjacent foreign country, in the case of import commerce.

In the Matter of Jurisdiction over Water Carriers, 15 I. C. C. Rep. 205.

The Act applies within the United States, to messages by telegraph, telephone, or cable, to any foreign country.

Act to Regulate Commerce, section 1.

The Act applies to foreign commerce in its transportation from the point of origin in the United States to the port of transshipment and from the port of entry to its destination in the United States or adjacent foreign country, even though the transportation within the United States be performed wholly within one state.

Re Investigation of Acts of Grand Trunk Ry. Co., 3 I. C. C. Rep. 89, 2 I. C. Rep. 496.

Traffic transported under a through bill of lading from a point within the United States through a port of transshipment to a point in a foreign country is subject to the Act.

Re Tariffs on Export and Import Traffic, 10 I. C. C. Rep. 55. T. & P. R. Co. vs. I. C. C., 162 U. S. 197, 16 Sup. Ct. 666, 40 L. Ed. 940.

Re Investigation of Acts of Grand Trunk Ry. Co., 3 I. C. C. Rep. 89, 2 I. C. R. 496.

The provisions of the Act to Regulate Commerce apply to foreign as well as domestic common carriers engaged in the transportation of passengers or property, for a continuous carriage or shipment, from a place in the United States to a place in an adjacent foreign country, where such foreign carriers are within the territorial jurisdiction of the United States.

Moore on Interst. Com. Law, section 39, page 72.

The Commission is without jurisdiction over violations of the Act committed wholly or partly in Canada.

U. S. vs. Knight, 3 I. C. Rep. 801.

The jurisdiction of the Act over foreign commerce is limited to the control of its transportation by rail, or partly by rail and partly by water, to and from the point of transshipment.

Cosmopolitan, etc., Co. vs. Ham. Am., etc. Co., 13 I. C. C. Rep. 266.

See also:

Payne vs. Morgan's, etc., Co., 15 I. C. C. Rep. 185.

The Commission has no jurisdiction over foreign commerce, or the rates thereon, from foreign point of origin to port of entry in the United States or an adjacent foreign country, or from the point of transshipment in the United States, or adjacent foreign country, to its foreign destination.

N. Y., etc., Co. vs. Penna. R. R. Co., 4 I. C. C. Rep. 447, 3 I. C. Rep. 417.

Senate Report on original Act to Regulate Commerce, 1886

The transportation of any shipment originating in the United States and going to a destination in an adjacent foreign country is subject to the Act within the United States.

In Re Investigation of Acts of Grand Trunk Ry. Co., 3 I. C. C. Rep. 89, 2 I. C. Rep. 496.

§ 49. Statutory Provisions Relating to Transportation to Ports of Transshipment.

The Act applies to the transportation of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment.

Act to Regulate Commerce (Amd. 1910) section 1.

The transportation of foreign traffic between the point of origin in the United States and the port of transshipment, whether performed by railroad, or partly by railroad and partly by water, is subject to the Act up to the port of transshipment.

Act to Regulate Commerce (Amd. 1910) section 1. •

It is not necessary that the transportation of foreign commerce between the point of origin in the United States and the port of transshipment be through more than one state to bring it within the jurisdiction of the Act. The transportation of the inland movement of a foreign shipment may be performed wholly within one state, and the jurisdiction of the Commission still attaches.

In *Re Investigation of Acts of Grand Trunk Ry. Co.*, 3 I. C. C. Rep. 89, 2 I. C. Rep. 496.
T. & P. Ry. Co. vs. I. C. C., 162 U. S. 197, 16 Sup. Ct. 666, 40 L. Ed. 940.

Since it is the nature of the traffic, and not its mere incidents, that establishes regulatory jurisdiction, this general test may not be omitted in the case of foreign commerce. The fact that there is an arrangement by which traffic is to be carried as foreign freight is evidenced by the conduct of each of the carriers. Thus, where foreign freight originating at places in the United States is sent to San Francisco, taken by the steamship line and carried to Balboa or Colon, where it is unloaded for transshipment and is

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taken up by the foreign ship and carried to its destination, constitutes foreign commerce.

Application S. P. Co., in re Operation S. S. Co., 32 I. C. C. Rep. 690, 698.
Curry & Whyte Co. vs. D. & I. R. R. Co., 32 I. C. C. Rep. 162, 171.

See also :

New Orleans Board of Trade vs. I. C. R. R. Co., 29 I. C. C. Rep. 32.

§ 50. Statutory Provisions Relating to Transportation of Foreign Traffic from a Foreign Country to a Point in the United States.

The Act applies to the transportation in like manner of property shipped from a foreign country to any place in the United States and carried to such place from a port of entry, either in the United States or an adjacent foreign country.

Act to Regulate Commerce, section 1.

The jurisdiction of the Act is over the movement of traffic from a foreign country from the port of entry in the United States or in an adjacent foreign country to the point of destination within the United States, and the jurisdiction lies even though such internal movement be consummated wholly within the confines of a single state.

R. R. Com., etc., vs. Clyde S. S. Co. et al., 5 I. C. C. Rep. 324, 4 I. C. Rep. 120.

The transportation of property from foreign countries not adjacent through the United States to an adjacent foreign country is subject to the Act as to the internal movement and tariffs covering such movement must be filed.

I. C. C. Confr. Rulings, Bull. No. 6, Ruling No. 294.

See also:

- Eagle Pass Lumber Co. vs. National Railways of Mexico, 25 I. C. C. Rep. 5.
Humboldt S. S. Co. vs. White Pass & Yukon Route, 25 I. C. C. Rep. 136, 140.
Fullerton Lumber & Shingle Co. vs. B. B. & B. C. R. R. Co., 25 I. C. C. Rep. 376, 378.
Young & Son vs. C. P. Ry. Co., Unreported Op. 935.
I. C. C. vs. H. S. Co., 224 U. S. 474, 484.

§ 51. When Act to Regulate Commerce Abrogates State Statute.

All state statutes and general laws in conflict with the Act are abrogated by its provisions.

- Gulf, etc., R. Co. vs. Hefley, 158 U. S. 98, 15 Sup. Ct. 802, 39 L. Ed. 910.
McNeill vs. Southern Ry. Co., 202 U. S. 543, 26 Sup. Ct. 722, 50 L. Ed. 1142.
T. & P. R. Co. vs. Mugg, 202 U. S. 242, 26 Sup. Ct. 628, 50 L. Ed. 1011.
Spratlin vs. St. L., etc., Ry. Co., 76 Ark. 82, 88 S. W. 836.
People vs. Chicago, etc., Ry. Co., 223 Ill. 581, 79 N. E. 144.
Larabee Co. vs. Mo. Pac. Ry. Co., 74 Kans. 808, 88 Pac. 72.
Atlanta, etc., R. Co. vs. Horne, 106 Tenn. 73, 59 S. W. 134.
Felder vs. Mo., etc., R. R. Co., (Tex. Civ. App.) 42 S. W. 362.

All local regulations, private contracts, and terms of franchise charters must give way to the jurisdiction of the Act when in conflict with it, since the power of the federal government to regulate interstate commerce is paramount to state authority.

- Am. Bankers' Assn. vs. Am. Ex. Co., 15 I. C. C. Rep. 15, 21.

Congress has by the Act to Regulate Commerce and amendatory and supplementary statutes covered the entire field of rates and rate making as to interstate commerce, which enactments have had the effect of superseding state legislation pertaining thereto, hence such rates cannot be prescribed or controlled by the states, nor can contracts with respect to such rates be subject to state legislation.

- St. L. I. M. & S. Ry. Co. vs. Edwards, 227 U. S. 265.
Wabash R. R. Co. vs. Priddy, 101 N. E. 724, 728;

St. L. & S. F. R. R. Co. vs. Bilby, 130 P. Rep. 1089.
 Sargent vs. Rutland R. R. Co., 85 A. Rep. 654, 659.
 St. L. & S. F. R. R. Co. vs. Zickafoose, 135 P. Rep. 406.
 State vs. C. M. & St. P. Ry. Co., 140 N. W. Rep. 70, 74.
 National Rice Milling Co. vs. N. O. & N. R. R. Co., 61 So. Rep. 708, 720.
 Chicago, R. I. & P. Ry. Co. vs. Beatty, 126 P. Rep. 736.
 Jones vs. Southern Express Co., 61 So. Rep. 165, 166.
 Sullivan vs. M. & R. R. Ry. Co., 142 N. W. Rep. 3.
 Pace Mule Co. vs. S. A. L. Ry. Co., 76 S. E. Rep. 513, 520.
 Duluth Superior Milling Co. vs. N. P. Ry. Co., 140 N. W. Rep. 1105.
 Harring vs. A. C. L. R. R. Co., 76 S. E. Rep. 527.
 State vs. Western & A. R. R. Co., 76 S. E. Rep. 577.
 Ezell vs. City of Atlanta, 78 S. E. Rep. 821.
 M. K. & T. Ry. Co. vs. Hailey, 156 S. W. Rep. 1119, 1121.
 Ford vs. C. R. I. & P. Ry. Co., 143 N. W. Rep. 249.

See also:

1915 Western Rate Advance Case, 35 I. C. C. Rep. 497, 576.
 Shands vs. S. A. L. Ry. Co., 34 I. C. C. Rep. 214.
 Truckers' Transfer Co. vs. C. & W. C. Ry. Co., 27 I. C. C. Rep. 275.
 Memphis Freight Bureau vs. I. C. R. R. Co., 27 I. C. C. Rep. 1, 2.
 Public Service Commission of Washington vs. W. P. Ry. Co., 26 I. C. C. Rep. 272, 274.
 Ohio R. R. Com. vs. Worthington, 225 U. S. 101, 108.
 Southern Ry. Co. vs. Reid, 222 U. S. 424, 442.
 Southern Ry. Co. vs. Reid & Beam, 222 U. S. 445.
 Southern Ry. Co. vs. Burlington Lumber Co., 225 U. S. 99.
 S. P. Co. vs. Campbell, 189 Fed. Rep. 696, 698.
 T. & P. Ry. Co. vs. R. R. Comm. of La., 183 Fed. Rep. 1005, 1007.
 St. L. I. M. & S. Ry. Co. vs. Edwards, 127 S. W. Rep. 713, 715.
 Chicago, etc., R. R. Co. vs. R. R. Comm., 87 N. E. Rep. 1030.
 Pittsburgh, etc., R. R. Co. vs. R. R. Comm., 86 N. E. Rep. 328.
 McElwain vs. Railroad, 131 S. W. Rep. 736.
 State vs. Missouri P. Ry. Co., 115 N. W. Rep. 614.
 Reid vs. Southern Ry. Co., 69 S. E. Rep. 618.
 Reid & Beam vs. Southern Ry. Co., 64 S. E. Rep. 874.
 Atchison T. & S. F. Ry. Co. vs. State, 123 P. Rep. 1065.
 St. L. & S. F. R. R. Co. vs. State, 107 P. Rep. 929.
 Martin vs. Oregon R. & Nav. Co., 113 P. Rep. 1620.
 Meetze vs. Southern Exp. Co., 74 S. E. Rep. 823, 824.
 L. & N. R. R. Co. vs. Smith, 134 S. W. Rep. 866, 872.
 R. R. Comm. of Tex. vs. T. & P. Ry. Co., 140 S. W. Rep. 829, 835.
 Trinity & B. V. Ry. Co. vs. Geppert, 135 S. W. Rep. 164, 165.
 Adams Exp. Co. vs. Charlottesville Woolen Mills, 63 S. E. Rep. 8, 9.

§ 52. "Interstate Commerce"—What Constitutes.

It is the essential character of the commerce, not its mere incidents, that determines whether or not it is interstate.

Interstate commerce begins with the shipment of the article in one state directed and destined to another state. It ends only with the delivery at destination. All common carriers by railroad which participate in its actual transportation, from the time of shipment to the time of delivery, are engaged in the transportation of property from one state to another whether their services be performed wholly within one state or in more than one state, whether such services be primary and called "carriage," or incidental, and called "switching," whether the carriers be paid a flat sum per car or a percentage of the through rate, and whether such payment be made directly by a shipper or consignee on the one hand, or by the initial or the final carrier on the other hand.

Where the business of through lines of railroad, of which a state carrier forms a part, consists, in a measure, of the transportation of passengers and freight into a state from other states and out of such state into other states, such business is interstate commerce and the transportation thereof subject to the Act.

N. & W. R. vs. Pa. 136 U. S. 114, 34 L. Ed. 394, 10 Sup. Ct. 958, see also 3 I. C. R. 178.

James, etc., vs. Cinn., etc., Ry. Co., 3 I. C. R. 682, 4 I. C. C. Rep. 744.

Mattingly vs. Pa. Co., 3 I. C. C. Rep. 592, 2 I. C. Rep. 806.

Aug. So. Ry. Co. vs. Wrightsville, etc., R. R. Co., 74 Fed. Rep. 522.

Ex Parte Koehler, 30 Fed. Rep. 867, 1 I. C. Rep. 28.

In Re Annapolis, etc., Ry. Co. (Tex. Civ. App.), 44 S. W. 542.

Because a state carrier receives as its share of the total charge, where connecting carriers have made a through route and established joint rates, an amount equal to its

individually established local rate, is not sufficient to make its carriage of such shipments of purely local character, but, on the contrary, such shipments remain interstate in character and subject to the Act.

Ind. Refrs.' Assn. vs. W., etc., R. R. Co., 6 I. C. C. Rep. 378.
U. S. vs. Seaboard Ry. Co., 82 Fed. Rep. 563.

See also:

U. S. vs. Union S. & T. Co., 192 Fed. Rep. 330, 339.
Seymour vs. M. L. & T. R. R. & S. S. Co., 35 I. C. C. Rep. 492, 493.
Kansas City, Mo., River Nav. Co. vs. C. & O. Ry. Co., 34 I. C. C. Rep. 67, 69.
Jurisdiction over Urban Electric Lines, 33 I. C. C. Rep. 536, 638.
U. S. vs. Union Stockyard & T. Co., 226 U. S. 286.
Aransas Pass Channel & Dock Co. vs. G. H. & S. A. Ry. Co., 27 I. C. C. Rep. 403, 410.
T. & P. Ry. Co. vs. Sargbehm, 150 S. W. Rep. 244, 246.
S. P. Terminal Co. vs. I. C. C., 219 U. S. 498.
Oregon Ry. & Nav. Co. vs. Campbell, 180 Fed. Rep. 253, 256.
Louisville & N. R. R. Co. vs. Coquillard Wagon Works Assignees, 144 S. W. Rep. 1080, 1081.
Baldwin Land Co. vs. Columbia Ry. Co., 114 P. Rep. 469.
Galveston, H. & S. A. Ry. Co. vs. Wood, 146 S. W. Rep. 538, 541.

§ 53. Character of Transportation Determined by Contract of Shipment.

The courts have held that the character of the transportation, whether the shipment is intrastate or interstate, will depend upon the contract for transportation. If a contract is entered into for transportation from a point in one state to a point in another state, the interstate character of the transportation will not change to intrastate or local without a change to that effect in the contract of transportation between the shipper and carrier.

Gulf, C. & S. F. Ry. Co. vs. Texas (1907), 204 U. S. 403, 27 Sup. Ct. 360.

In a through shipment the determinative feature is the agreement of transportation at the inception of the car-

riage that the shipment will be transported to the point of destination at a through rate.

In Re Alleged Unlawful Rates and Practices in Transportation of Cotton, (1899) 8 I. C. C. Rep. 121.

Whenever an article destined to a place without the state is started in transit, it becomes the subject of interstate commerce.

Ex Parte Koehler (1887), 30 Fed. Rep. 867.
The Daniel Ball, 10 Wall, (U. S.) 557, 19 L. Ed. 999.

Where a commodity is delivered to a common carrier to be carried on a continuous voyage or trip to a point beyond the limits of the state where such delivery is made, the character of interstate commerce, or of foreign commerce, attaches thereto.

Houston, etc., Nav. Co. vs. Ins. Co. N. A. (1895), 89 Tex. 1, 32 S. W. 889, 30 L. R. A. 713.

See also subsequent section 54, "Character of Transportation Controls, Not Shipper's Intent."

§ 54. Character of Transportation Controls, Not Shipper's Intent.

Prior to the amendment of 1906, a state carrier was not subject to the Act unless, by a common control, management, or arrangement, it made itself part of a line for the continuous carriage of interstate commerce, and necessarily the jurisdiction of the Commission was determinable from the nature of the arrangement for, rather than the character of, the transportation. Since the Hepburn amendment, however, the jurisdiction of the Commission over any all-rail transportation is determined from the character of the transportation itself, and not any arrangement under which the transportation is performed.

Leonard vs. K. C. S. Ry. Co., 13 I. C. C. Rep. 573.

The intention of the owners of an interstate shipment to forward the same from its original terminal point to another point within the same state, does not make the shipment between such points, carried by a connecting carrier to which the shipment was delivered by the original terminal carrier in accordance with the shippers' instructions, interstate. Nor is such secondary transportation exempt from the authority of the state in which it is performed.

Gulf C. & S. F. Ry. Co. vs. Texas, 204 U. S. 403, 27 Sup. Ct. 360.

See also:

Cutting vs. Fla. Ry. & N. Co., 46 Fed. Rep. 641.

A shipper's intention to have a shipment, originally made between points wholly within the same state, go on to an ultimate destination outside of the state in the absence of a joint rate from original point of origin to the ultimate destination, does not make it interstate up to the original terminal point, although it is the practice and custom of such shipper to forward his shipments on to points in other states.

Mo., etc., R. R. Co. vs. Cape Girardeau, etc., R. R. Co., 1 I. C. C. R. 30, 1 I. C. R. 607.

Hope Cotton Oil Co. vs. Texas & Pac. Ry. Co., 10 I. C. C. R. 696, 703.

St. Louis Hay & Grain Co. vs. Chicago, etc., R. R. Co., 11 I. C. C. R. 82.

Laning-Harris Co. vs. Mo. Pac. R. R. Co., 13 I. C. C. R. 154.

Hope Cotton Oil Co. vs. T. & P. Ry. Co., 12 I. C. C. R. 265.

In this connection the question has arisen whether a shipper has a legal right to evade the lawfully published joint rate on a shipment moving between points in adjoining states by arranging to bill the shipment on the local rates to and from an intermediate point instead of using through billing to the ultimate destination.

The Interstate Commerce Commission passed upon this question in the Kanotex Case, holding that the lawfully established interstate rate applies to shipments first billed to an intermediate point within the state of origin and then rebilled to the intended destination in an adjoining state, citing in support thereof the Southern Pacific Terminal Co., Worthington, and Sabine Tram Co. cases, wherein the Supreme Court of the United States upheld the principle in *Coe vs. Errol*, 116 U. S. 517, that goods are in interstate, and necessarily as well in foreign, commerce when they have "started in the course of transportation to another state or delivered to a carrier for transportation."

Kanotex Refining Co. vs. I. C. C., 219 U. S. 498.
Ohio R. R. Comm. vs. Worthington, 205 U. S. 101.
Tex. & New Orl. R. R. Co. vs. Sabine Tram Co., 207 U. S. 111.

Compare:

C. M. & St. P. Ry. Co. vs. Iowa, 233 U. S. 334.
Gulf, Colo. & Santa Fe Ry. Co. vs. Texas, 204 U. S. 403.

See also, this volume, chapter V, section 56, "Effect of Temporary Stoppage in Transit," post.

§ 55. "Common Arrangement" Clause Not Applicable to All-Rail Transportation.

Since the amendment of 1906, the original purpose of the Act to apply its provisions to all interstate all-rail transportation has been given effect by the holdings of the Commission that the words "common control, management, or arrangement," now plainly apply only to transportation which is partly by rail and partly by water, and the Act now unmistakably subjects any carrier which engages in the movement of freight by rail from a point in one state to a point in another state, to its provisions.

Such was the undoubted intention of the framers of the original Act and such was the suggested interpretation of the courts and the Commission.

In Re Jurisdiction over Water Carriers, 15 I. C. C. Rep. 205.
Leonard vs. K. C. S. Ry. Co., 13 I. C. C. Rep. 573, 578.

See also:

T. & P. R. R. Co. vs. I. C. C., 162 U. S. 197, 211, 16 Sup. Ct. 666, 40 L. Ed. 940.
Vermont St. Grange vs. B. & L. R. R. Co., 1 I. C. C. Rep. 159, 1 I. C. Rep. 500.
B. & A. R. R. Co. vs. B. & L. R. R. Co., 1 I. C. C. Rep. 158, 1 I. C. Rep. 500.

§ 56. Effect of Temporary Stoppage in Transit.

An article remains an article of interstate commerce as long as it is subject to a transit tariff. Where a shipment is destined to a point outside of the state, its temporary stoppage within the state of its origin will not divest it of its interstate character.

When a commodity is purchased in and shipped from one state to a point in another state the transaction is indelibly impressed with the character of interstate commerce, and the various mutations through which the article passes and the handlings which it undergoes while in transit are merely incidental to the movement.

Transit Case, 24 I. C. C. Rep. 340, 351.
Hood & Sons vs. D. & H. C. Co., 17 I. C. C. Rep. 15.
D. & H. C. Co. vs. Commonwealth, 2 I. C. Rep. 222.
R. R. Commission of Louisiana vs. St. L. S. W. Ry. Co. et al., 23 I. C. C. Rep. 31, 42.

Compare:

Doran & Co. vs. N. C. & St. L. Ry. Co., 33 I. C. C. Rep. 523, 530, 531.

See also, this volume, chapter V, section 54, "Character of Transportation Controls, Not Shipper's Intent."

§ 57. Intraterritorial Transportation.

See this volume, chapter V, section 32, "Intraterritorial Common Carriers," ante.

§ 58. Rail-and-Water Transportation.

Prior to the taking effect of the Panama Canal Act, the Act to Regulate Commerce did not apply to transportation by water unless the same was used in interstate transportation in connection with a railroad, "under a common control, management, or arrangement for a continuous carriage or shipment."

Ex Parte Koehler, 30 Fed. Rep. 867.
U. S. vs. Wood et al., 145 Fed. Rep. 405.

The receiving, forwarding, and delivering of traffic originating in one state and with its prescribed destination in another state by connecting carriers, establishes the existence of a common arrangement between such carriers for a continuous carriage or shipment. And the principle likewise applies to rail-and-water carriers.

Phelps & Co. vs. T. & P. Ry. Co., 6. I. C. C. Rep. 36, 4 I. C. Rep. 363.

The Commission has said that the main purpose of the Act was to regulate transportation by railroad; that the regulation of water lines was merely incidental and collateral, and was included in order that the regulation of railroads might be effective and not virtually nullified by arrangements between railroads and water lines. As a fundamental proposition it is obvious that interstate commerce wholly by water is not subject to the Act. It is equally obvious that interstate commerce partly by railroad and partly by water, under a common control, management, or arrangement for a continuous carriage or shipment, is subject to the Act. Does the fact that some

of the commerce transported by a carrier is subject to the Act *ipso facto*, render all the commerce transported by that carrier, including its port-to-port traffic, subject to the Act? The Commission, after a full and careful consideration of this question, prior to the taking effect of the Panama Canal Act, announced that it was constrained to change its former ruling (**Conference Ruling 66, of May 4, 1908**), and to adopt the view that water carriers were subject to the law only as to such traffic as was transported under a common control, management, or arrangement, with a rail carrier, and that as to traffic not so transported they were exempt from its provisions, citing **Re Jurisdiction over Water Carriers, 15 I. C. C. Rep. 205**.

While in some instances the courts have declared that their holdings as to what constitutes a "common arrangement" between railroads does not apply to cases where one of the participating carriers is an independent water line, still there can be little doubt that the principle would apply in such latter instance. But the language of the Commission itself fixes with certainty the "common arrangement" test it applied where the transportation was partly by rail and partly by water, having repeatedly held that the receipt, forwarding, and delivery of shipments by connecting carriers clearly established the existence of a common arrangement between the carriers for continuous carriage or shipment.

Moore on Interst. Com. Law, section 45, page 81.

Camden Iron Wks. vs. U. S., 158 Fed. Rep. 561, 563.

Ex Parte Koehler, 30 Fed. Rep. 867, 869.

U. S. vs. Colorado, etc., R. R. Co., 157 Fed. Rep. 321, 342.

Phelps & Co. vs. Texas & Pac. Ry. Co., 6 I. C. C. Rep. 36.

The acceptance by a water carrier of through traffic on through bills of lading issued by a rail carrier is an evidence of an arrangement for continuous carriage which

subjects the traffic to the provisions and jurisdiction of the Act to Regulate Commerce.

I. C. C. Confr. Rulings Bull. No. 6, Ruling No. 354.

Traffic moving by rail from an inland point to a port and thence by water to another port, or moving by water from one port to another port and from the latter port to an inland point by rail, and which does not pass into the possession or custody of the owner or his agent at the port, is interstate traffic, subject to the Act and under the jurisdiction of the Commission.

I. C. C. Confr. Rulings Bull. No. 6, Ruling No. 155.

Referring to water carriers, as defined in section 1 of the Act, the Commission has held:

That if a rail carrier and a water carrier separately publish and file their rates applicable to through shipments, traffic over such route may lawfully be transported under through bills of lading, even though the rates are not joint through rates.

That a water carrier may not lawfully accept shipments for transportation on through bills of lading issued by a railroad carrier unless the water carrier has lawfully published and filed rates applicable thereto.

That the acceptance by a water carrier of through traffic on through bills of lading issued by a railroad carrier is an evidence of an arrangement for continuous carriage which subjects the traffic to the provisions and jurisdiction of the Act.

That it is not lawful for a rail carrier to issue through bills of lading under an arrangement with a water carrier for continuous carriage, when the water carrier has no lawfully published and filed rates applicable to such transportation.

These holdings are not to be understood as conflicting with Rule 71, Tariff Circular 18-A.

I. C. C. Confr. Rulings Bull. No. 6, Ruling No. 353.

For extended jurisdiction of the Commission over water carriers since the taking effect of the Panama Canal Act, see, this volume, chapter V, section 16, "Rail and Water Carriers," and section 29, "Inland Water Carriers."

See also:

Federal Sugar Refining Co. vs. C. of N. J. R. R. Co., 35 I. C. C. Rep. 488.

Tampa Board of Trade vs. A. & V. Ry. Co., 33 I. C. C. Rep. 457.

Transcontinental Commodity Rates, 31 I. C. C. Rep. 449.

Pacific Navigation Co. vs. S. P. Co., 31 I. C. C. Rep. 472.

Bowling Green Protective Assn. vs. E. & B. G. P. Co., 31 I. C. C. Rep. 301, 306.

Decatur Navigation Co. vs. L. & N. R. R. Co., 31 I. C. C. Rep. 281.

Tampa Board of Trade vs. L. & N. R. R. Co., 30 I. C. C. Rep. 377.

Lumber Rates, Oregon and Washington to Eastern Points, 29 I. C. C. Rep. 609, 619.

Trucker's Transfer Co. vs. C. & W. C. Ry. Co., 27 I. C. C. Rep. 275.

Wharfage Facilities at Pensacola, Fla., 27 I. C. C. Rep. 252, 257.

Augusta & Savannah Steamboat Co. vs. O. S. S. Co., 26 I. C. C. Rep. 380.

Panama Canal Act, sections 2 and 3.

Act to Regulate Commerce, section 6.

CHAPTER VI.

THE ACT TO REGULATE COMMERCE AS AMENDED (CONTINUED).

Amplification of Sections (Continued).

- § 1. Not all Carriers or Transportation Subject to the Act.
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 - (1) Status of States and Territories under the Commerce Clause of the Constitution of the United States.
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- § 4. Water Transportation not Subject to the Act.
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 - (1) Additional Statutory Provisions.
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 - (1) Circuitous Routes.
 - (2) Voluntary Establishment of Through Routes.
 - (3) The Commission may Compel the Establishment of Through Routes.
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(6) "Railroads of Different Character" Defined.

§ 16. Joint Rates Compared with Through Rates.

§ 17. Changes in Rates do not Affect Traffic in Course of Through Transportation.

§ 18. When Changes in Rates may Affect Traffic in Course of Transportation.

§ 19. Right of Shipper to Reasonable Through Rates.

§ 20. Through Rates—Combination of Joint Rate to Common Points and Local Rate Beyond.

§ 21. Basing Points or Factors for Combination Rates may be Specified.

CHAPTER VI.

THE ACT TO REGULATE COMMERCE AS AMENDED (CONTINUED).

Amplification of Sections (Continued).

§ 1. Not All Carriers or Transportation to the Act.

The Act provides that its provisions shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one state and not shipped to or from a foreign country from or to any state or territory, nor shall its provisions apply to the transmission of messages by telephone, telegraph, or cable wholly within one state and not transmitted to or from a foreign country from or to any state or territory.

Act to Regulate Commerce, section 1.

Congress itself is without power to regulate the commerce wholly within a state.

Constitution of U. S. article 1, section 8, clause 3.
Re Jurisdiction over Water Carriers, 15 I. C. C. Rep. 205, 208.

The intent and purpose of Congress in the passage and subsequent amendatory and supplemental legislation was to provide for the regulation by the Commission of the whole field of national commerce—that between states and territories, within the territories and the District of Columbia, and going to and coming from foreign countries—except that wholly within a state.

T. & P. Ry. Co. vs. I. C. C., 162 U. S. 197, 16 Sup. Ct. 666, 40 L. Ed. 940.

See also:

Simpson vs. Shepard, 230 U. S. 352.
 I. C. C. vs. C. N. O. & T. P. Ry. Co., 167 U. S. 479, 495.
 Wabash, etc., R. Co. vs. Illinois, 118 U. S. 557.
 Peik vs. C. & N. W. Ry. Co., 94 U. S. 164.

§ 2. Intrastate Transportation When Not Subject to the Act.

Transportation of passengers or property, by rail or otherwise, when handled or carried wholly within a single state is not subject to the provisions of the Act to Regulate Commerce, nor has the national Commission jurisdiction or power to award reparation for discrimination affecting such traffic.

N. J., etc., Exchg. vs. Cent., etc., of N. J., 2 I. C. C. Rep. 142,
 2 I. C. Rep. 84.

Gallogly, etc., vs. Cinn., etc., Ry. Co., 11 I. C. C. Rep. 1.

Ex Parte Koehler, 30 Fed. Rep. 867.

Gen. Tr. Co., etc., vs. P. S. & N. R. Co., 101 N. Y. Sup. 837.

A common carrier whose line is wholly within one state may form a link in a line of interstate commerce, but if its relation to such commerce, or interest in, or liability for the carriage thereof, does not extend beyond the line of the state, it is not within the purview of the Act to Regulate Commerce.

Ex Parte Kehler, 30 Fed. Rep. 867.

Since the amendment of 1906, and under the rulings of the Commission, any carrier whose line is wholly within one state but which engages in interstate commerce as defined in the Act, becomes subject thereto. Thus, a state common carrier is only exempt from the operation of the Act when it is engaged in that part of its business the transportation of which begins and terminates within the same state.

Employers' Liability Case, 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297.

Ft. W. & D. C. Ry. Co. vs. Whitehead, 6 Tex. Civ. App. 595, 26 S. W. 172.

U. S. vs. Chicago, etc., R. R. Co., 81 Fed. Rep. 783.

I. C. C. vs. Bellaire, etc., Co., 77 Fed. Rep. 942.

Haines vs. Chicago, etc., Ry. Co., 13 I. C. C. Rep. 214.

Rogers & Co. vs. P. & R. Ry. Co., 12 I. C. C. Rep. 308.

Parks vs. Cinn., etc., R. R. Co., 10 I. C. C. Rep. 47.

Where the carriage or handling of a shipment is performed independently and wholly within the same state, and the carrier performing such state service has nothing to do with the further transportation of the shipment without the state, the carriage wholly within the state does not become subject to the jurisdiction of the Commission.

K. & I. Br. Co. vs. Louisville, etc., R. R. Co., 37 Fed. Rep. 567, 2 I. C. C. Rep. 162 (Appeal dismissed by 149 U. S. 777, 13 Sup. Ct. 1048, 37 L. Ed. 964).

Interst. S. Y. Co. vs. Indpls. Un. Ry. Co. et al., 99 Fed. Rep. 472.

N. J., etc., Ex. vs. Central, etc., of N. J., 2 I. C. C. Rep. 142, 2 I. C. Rep. 84.

U. S. vs. Chicago, etc., Co., 81 Fed. Rep. 783.

I. C. C. vs. Bellaire, etc., Ry. Co., 77 Fed. Rep. 942.

Ft. W. & D. C. Ry. Co. vs. Whitehead, 6 Tex. Civ. App. 595, 26 S. W. 172.

Ex Parte Koehler, 30 Fed. Rep. 867, 1 I. C. Rep. 28.

Mo., etc., Co. vs. Cape Girardeau, etc., Ry. Co., 1 I. C. C. Rep. 30, 1 I. C. Rep. 607.

In the Minnesota Rate Case (230 U. S. 352) the power of the state to regulate transportation between points within the state was clearly defined and upheld, to be exercised by the state in such manner as not to invade the carriers' rights under the Fourteenth Amendment. The court said:

"If this authority of the state be restricted, it must be by virtue of the paramount power of the Congress over interstate commerce and its instruments; and, in view of the nature of the subject, a limitation may not be implied because of a dormant federal power, that is, one which has not been exerted, but can only be found in the actual exercise of federal control in

such measure as to exclude this action by the state which otherwise would clearly be within its province."

Simpson vs. Shepard, 230 U. S. 352.

I. C. C. vs. C. N. O. & T. P. Ry. Co., 167 U. S. 479.

Wabash, etc., Ry. Co. vs. Illinois, 118 U. S. 557.

Peik vs. N. W. Ry. Co., 94 U. S. 164.

So. Ry. Co. vs. Reid, 222 U. S. 424, 435.

In the Reid Case the Supreme Court divided the power of the state over the general subject of commerce into three classes:

- (1) "Those in which the power of the state is exclusive;"
- (2) "Those in which the states may act in the absence of legislation by Congress;" and
- (3) "Those in which the action of Congress is exclusive and the state cannot act at all."

See also:

Western Union Tel. Co. vs. James, 162 U. S. 650, 655.

Covington, etc., Bridge Co. vs. Kentucky, 154 U. S. 204, 209.

The Supreme Court, in discussing the control of the state over commerce, had previously said:

"Every person, every corporation, everything within the territorial limits of a state is, while there, subject to the constitutional authority of the state government. Clearly under this rule Mississippi may govern this corporation, as it does all domestic corporations, in respect to every act and everything within the state which is the lawful subject of state government. It may, beyond all question, by the settled rule of decision in this court, regulate freights and fares for business done exclusively within the state, and it would seem to be a matter of domestic concern to prevent the company from discriminating against persons and places in Mississippi. So, it may make all needful regulations of a police character for the government of the company while operating its road in that jurisdiction. In this way it may certainly require the company to fence so much of its road as lies within the state; to stop its trains at railroad crossings; to slacken speed while running in a crowded thoroughfare; to post its tariffs and time-tables at proper places, and other things of a kindred character affect-

ing the comfort, the convenience, or the safety of those who are entitled to look to the state for protection against the wrongful or negligent conduct of others. * * *

"From what has thus been said, it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretence of regulating fares and freights, the state cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation or without due process of law."

Stone vs. Farmers Loan & Trust Co., 116 U. S. 307.

(1) Status of States and Territories Under the Commerce Clause of the Constitution of the United States. Territories and the District of Columbia are to be regarded as states in the sense that that word is used in the commerce clause of the Constitution, otherwise internal commerce within a territory, between a state and a territory, would be beyond the reach of any legislative authority, either state or federal.

Art. 1, section 8, cl. 3, Const. of U. S.

Hanley vs. K. C. S. Ry. Co., 187 U. S. 617, 23 Sup. Ct. 214, 47 L. Ed. 333.

Stoutenburgh vs. Hennick, 129 U. S. 141, 9 Sup. Ct. 256, 32 L. Ed. 637.

Re Hennick, 5 Mackey (D. C.) 489.

Matter of Wilson, 10 N. M. 32, 60 Pac. Rep. 73.

Wilson vs. Rk. Cr. Ry. Co., 7 I. C. C. Rep. 83.

Re Wilson, 8 Mackey (D. C.) 341, 12 L. R. A. 624.

Neil vs. Wilson, 14 Oreg. 410, 12 Pac. Rep. 810.

(2) Effect of Admitting State Into Union. The jurisdiction of the Act and the authority of the Commission automatically cease as to intraterritorial commerce when a territory is admitted to statehood in the Union, and the Commission is at once without authority to act in cases of

complaint filed with the Commission prior to such admission to statehood.

Koenigsberger vs. Richmond Silver Min. Co., 158 U. S. 48, 15 Sup. Ct. 751, 39 L. Ed. 892.

McNulty vs. Batty, et al., 10 How. (U. S.) 173, 13 L. Ed. 333.

Freeborn, et al., vs. Smith, et al., 2 Wall. (U. S.) 173, 17 L. Ed. 922.

Hussey vs. C., etc., Ry. Co., 13 I. C. C. Rep. 366.

Chandler Cotton Oil Co. vs. Ft. S. & W. R. R. Co., 13 I. C. C. Rep. 473.

§ 3. Foreign Transportation Not Subject to the Act to Regulate Commerce.

The jurisdiction of the Commission is over only that part of the through import or export rate which applies to the inland transportation of the carrier, and it has not jurisdiction or authority over non-adjacent foreign destined traffic after it leaves the seaboard point of transshipment or non-adjacent foreign originating traffic before it reaches a port of entry on the American seaboard, nor over foreign destined traffic originating at a seaport and involving no inland transportation.

Import Rate Case, 162 U. S. 197, 40 L. Ed. 940.

Cosmopolitan, etc., Co. vs. Hamburg American, etc., Co., 13 I. C. C. Rep. 266.

See, this volume, chapter V, section 26, "Foreign Railroads as Common Carriers"; section 32, "Ocean Carriers"; section 45, "Interstate and Foreign Commerce Subject to the Act"; section 46, "Transportation of Foreign Traffic Between the United States and Adjacent Foreign Country"; section 47, "Statutory Provisions Relating to Transportation to Ports of Transshipment"; section 48, "Transportation of Foreign Traffic from a Foreign Country to a Point in the United States."

§ 4. Water Transportation Not Subject to the Act.

See, this volume, chapter V, section 16, "Rail-and-Water Carriers," and section 29, "Inland Water Carriers."

Act to Regulate Commerce, section 1.

§ 5. Instrumentalities of Transportation Within Authority of the Act to Regulate Commerce.

The Act to Regulate Commerce specifies, defines, and enumerates as subject to its provisions the following instrumentalities of transportation and shipping:

Railroads.

Bridges and ferries used or operated in connection with any railroad.

Railroads in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease.

Switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated in the Act.

Freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property.

Cars and other vehicles, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof.

Vessels and other water bottom carriers designated in the amendatory portions of the Panama Canal Act.

Act to Regulate Commerce, sections 5 and 6.

§ 6. Transportation Services Within Authority of the Act to Regulate Commerce.

The provisions of the Act to Regulate Commerce bring within its jurisdiction and authority all services in connec-

tion with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported.

Act to Regulate Commerce, section 1.

§ 7. Duties of Carriers Subject to the Act to Regulate Commerce to Furnish Transportation Services.

The provisions of the Act to Regulate Commerce require the carriers to furnish transportation service as defined in the Act upon reasonable and just terms, equally and impartially, to all entitled thereto.

The terms of the Act require such carriers to establish through routes and just and reasonable rates applicable thereto.

Act to Regulate Commerce, section 1.

§ 8. Duty of Carriers Subject to the Act to Regulate Commerce to Furnish Facilities.

Under the common law it is the duty of the carrier to furnish adequate and essential facilities necessary and incidental to the services performed by the carrier. For a long time the Interstate Commerce Commission was without power to enforce this common law requirement, even though the subject was within the Commission's constructive jurisdiction.

Truck Farmers, etc., Assn. vs. N. E. R. R. Co., 6 I. C. C. Rep. 295.

Knudsen-Ferguson, etc., vs. M. C. R. R. Co., 148 Fed. Rep. 968.

Consl. & F. Co. vs. S. P. R. R. Co., 10 I. C. C. Rep. 590.

Re Transportation, etc., of Fruit, 11 I. C. C. Rep. 129.

R. R. Comm., etc., vs. L. & N. R. R. Co., 10 I. C. C. Rep. 173.

See also:

Atlantic Coast Line R. R. Co. vs. Garaty, 166 Fed. Rep. 10.

The provisions of the Act to Regulate Commerce re-

quire that every common carrier subject thereto shall provide reasonable facilities for the operation of through routes with reasonable rules and regulations with respect to the exchange, interchange, and return of cars used therein, and for the operation of such through routes, and providing for reasonable compensation to those entitled thereto.

Act to Regulate Commerce, section 1.

The third section of the Act requires such carriers to afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith.

Act to Regulate Commerce, section 3, par. 2.

In the **Five Per Cent Case**, the Commission clearly stated its attitude toward the development of, and necessity for, adequate transportation service. It said:

"The means of transportation are fundamental and indispensable agencies in our industrial life and for the common weal should be kept abreast of public requirements," for "the public interest demands not only the adequate maintenance of existing railroads, but a constant increase of our transportation facilities to keep pace with the growth and requirements of our commerce."

The carriers must furnish, if they are to fulfill the fundamental purpose of the Act, an efficient transportation service, including adequate and necessary facilities, at reasonable rates.

Five Per Cent Case, 31 I. C. C. Rep. 351 and 32 I. C. C. Rep. 325.

Penn. Paraffine Works vs. Penn. R. R. Co., 34 I. C. C. Rep. 179.

Vulcan Coal & Mining Co. vs. I. C. R. R. Co., 33 I. C. C. Rep. 52.

It has also been held by the courts that whatever transportation services or facilities the law requires the carrier to supply, the carrier has a right to furnish. In other words, the carrier is not compelled by law to use the facilities of others either by lease or otherwise.

Atchison, etc., Ry. Co. vs. U. S., 231 U. S. 199.

Arlington Heights Fruit Exchange vs. S. P. Co., 20 I. C. C. Rep. 106.

See also:

Pittsburgh & Southwestern Coal Co. vs. W.-P. T. Ry. Co., 31 I. C. C. Rep. 660, 662.

Merchants & Mfrs. Assn. vs. B. & O. R. R. Co., 30 I. C. C. Rep. 388, 393.

Lumber Rates through Ohio River Crossings, 29 I. C. C. Rep. 38, 39.

Penn. Paraffine Works vs. P. R. R. Co., 34 I. C. C. Rep. 179, 190.

Car Spotting Charges, 34 I. C. C. Rep. 609, 617.

Vulcan Coal & Mining Co. vs. I. C. R. R. Co., 33 I. C. C. Rep. 52.

St. L. S. & P. R. R. Co. vs. P. & P. W. Ry. Co., 26 I. C. C. Rep. 226, 234.

Southwestern Mo. Millers' Club vs. St. L. & S. F. R. R. Co., 26 I. C. C. Rep. 245, 252.

Protection of Potato Shipments in Winter, 26 I. C. C. Rep. 681, 684.

Arlington Heights Fruit Exchange vs. S. P. Co., 20 I. C. C. Rep. 106.

§ 9. Special Facilities for Handling and Transporting Live Stock.

The statutory requirement in the Act to Regulate Commerce, since amendment of 1906, that the carrier shall furnish the necessary facilities for the receipt, transportation, delivery, and handling of property transported, includes the obligation on the part of the carrier to furnish such designated special facilities as the particular nature of the property transported may require. Thus, in the case of the receipt, care, handling, transporting, and delivery of live stock, the carrier is required to furnish adequate and suitable facilities therefor, such as pens, chutes, yards,

watering and feeding facilities, inspectors, and live stock cars. The carrier may not assess charges in addition to the legitimate tariff charges for receiving or delivering live stock through yards provided for that purpose. This duty the common law placed upon the carrier even before the passage of the original Act to Regulate Commerce, and the amendment of the Act in 1906 was but a detail in the statutory expression of the common law.

Covington Stk. Yds. Co. vs. Keith, 139 U. S. 128, 35 L. Ed. 73.
N. P. R. R. Co. vs. Commercial, etc., of Chicago, 123 U. S. 727,
31 L. Ed. 287.

If a carrier offers to and provides rates for the transportation of live stock, such as sheep and hogs in double deck cars, it is under the duty to furnish such special equipment, and a state regulation requiring a carrier to furnish double deck cars for the transportation of sheep is a reasonable requirement and constitutional.

Pa. Paraffine Works vs. P. R. R. Co., 34 I. C. C. Rep. 179.
Emerson vs. St. L. & R. Co., 111 Mo. 161.

A carrier may not own or exercise any control over an independent stock yards at a given point, but if such yards are in fact the point to which such carrier transports and unloads stock, such yards will be deemed the carrier's live stock depot at that point.

Cattle Raisers' Assn. vs. Chicago, etc., R. R. Co., 11 I. C. C. Rep. 277.

If the carrier has provided special yards as a live stock depot at a particular city, such carrier may not be compelled, under the provisions of the Act to Regulate Commerce, to make delivery of live stock shipments at some other yard or point in that city, even though it connects with the line of the carrier on which such other yards are situated.

Central Stock Yds. Co. vs. N. & P. R. R. Co., 118 Fed. Rep. 113.
Central Stock Yds Co. vs N. & P. R. R. Co., 192 U. S. 68, 48 L.
Ed. 565.

§ 10. Through Routes and Joint Rates.

Section 1 of the Act to Regulate Commerce requires every common carrier subject to the Act to "establish through routes and just and reasonable rates applicable thereto and to provide reasonable facilities for operating such through routes and to make reasonable rules and regulations with respect to the exchange, interchange, and return of cars used therein and for the operation of such through routes and providing for reasonable compensation to those entitled thereto."

The requirement to establish through routes was incorporated into the Act by the amendment of June 29, 1906, and the words "and to provide reasonable facilities for operating such through routes and providing for reasonable compensation to those entitled thereto," were added by the amendment of June 18, 1910.

Act to Regulate Commerce, section 1.

(1) **Additional Statutory Provisions.** In addition to the above requirements in section 1 of the Act, section 15 empowers the Commission, after hearing, on a complaint or upon its own initiative without complaint, to establish through routes and joint classifications and joint rates as the maximum to be charged, including terms and conditions under which such through routes shall be operated. The Commission is also authorized to prescribe the divisions of such joint rates as well as the terms and conditions under which such through routes shall be operated whenever the carriers themselves shall refuse or neglect to establish voluntarily such through routes or joint rates,

this provision also applying when one of the connecting carriers is a water line. The section goes on to provide that the Commission shall not, however, establish any through route, classification, or rate between street electric passenger railways, not engaged in the general business of transporting freight in addition to their passenger and express business and railroads of a different character, nor shall the Commission have the right to establish any route, classification, rate, fare, or charge when the transportation is wholly by water. Transportation by water, affected by the Act, is subject to the laws and regulations applicable to transportation by water and the provisions of the Panama Canal Act.

The power of the Commission to prescribe through routes is limited to the extent that in establishing such through routes the Commission may not require any common carrier, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies within the termini of such proposed through route, unless to do so would make such through route unreasonably long as compared with a practicable through route which could otherwise be established.

Act to Regulate Commerce, section 15.

The sixth section of the Act authorizes the Commission to establish through routes and maximum joint rates between and over rail and water lines having physical connection and to determine all the terms and conditions under which such lines shall be operated in the handling of the traffic moving or to be moved via such through route.

Act to Regulate Commerce, section 6.

It is further provided in section 6 of the Act that if any rail carrier subject to the Act enters into arrangements with any water carrier operating from a port in the United States to a foreign country through the Panama Canal or otherwise for the handling of through business between interior points of the United States and such foreign country, the Commission may require such railway to enter into similar arrangements with any or all other lines of steamships operating from said port to the same foreign country.

Act to Regulate Commerce, section 6.

The prohibition of section 4 applies with equal force to the charging of a greater compensation via a through route than the aggregate of the intermediate rates.

Act to Regulate Commerce, section 4.

§ 11. Purpose of the Through Route Requirement.

It is a rule of statutory construction that sentences, phrases, or even sections of a law, may not be given a segregated meaning but must be read and construed in conjunction with the whole of the statute of which they are a part. Thus, as we read the first section of the Act to Regulate Commerce in conjunction with its other sections, we find a cohesive effect in the aggregate given to its requirements. The purpose of the section relating to through routes is to require the railroads subject to the Act to so unite themselves that they will constitute one national system, for by these provisions of the Act they must establish through routes, keep such routes open and in operation, furnish the necessary facilities for transportation, make reasonable and proper rules of practice as between themselves and the shippers and as between each other.

Mo. and Ill. Coal Co. vs. Ill. Cent. R. R. Co., 22 I. C. C. Rep. 39, 46.

§ 12. What Is a Through Route?

The words "through route" contemplate an agreement, voluntary, or under the requirement of the Commission, of two or more carriers to provide a line made up of all or parts of their lines between certain points. Such a through route is a unit of transportation movement and such a common arrangement may be evidenced by the issuing of through bills of lading for continuous carriage thereunder or the publication of through rates therefor.

A through route in the sense in which this term is generally used embraces two or more lines of railroad moving traffic under conventional agreements at rates or fares made applicable for through service between designated points.

The phrase "common arrangement" has been interpreted by the courts to mean an "agreement or understanding between connecting carriers respecting the transportation of property and the charges and divisions to be made therefor."

A rail carrier, by participating in a through route between two termini, only one of which is reached by its rails, in fact serves both termini, and may compete within the meaning of section 5 with steamers operating as part of another through route between the same termini.

Peninsular & Occidental S. S. Co., 37 I. C. C. Rep. 432, 434.

The Ogden Gateway Case, 35 I. C. C. Rep. 131, 142.

Kansas City, Mo., and Kansas City, Kans., vs. Kansas City Viaduct & Term. Ry. Co., 24 I. C. C. Rep. 22, 26.

Flour City S. S. Co. vs. Leh. Val. R. R. Co., 24 I. C. C. Rep. 179.

Augusta & Savannah S. S. Co. vs. O. S. S. Co. of Savannah, 26 I. C. C. Rep. 380, 383.

Commercial Club of Omaha vs. A. & S. R. R. Co., 27 I. C. C. Rep. 302, 318.

People's Fuel & Supply Co. vs. G. T. R. R. Co., 27 I. C. C. Rep. 24, 28.

Mutual Transit Co. vs. U. S., 178 Fed. Rep. 664, 666.

C. B. & Q. R. R. Co. vs. U. S., 157 Fed. Rep. 830, 833.

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Citizens of Somerset, etc., vs. Wash. Ry. & Elec. Co., 22 I. C. C. Rep. 187, 191.

Truckers Transfer Co. vs. C. & W. C. Ry. Co., 27 I. C. C. Rep. 275.

A through route may now be established with a water carrier under the construction given to the provisions of the Panama Canal Act.

Panama Canal Act, see Appendix.

Federal Sugar Refining Co. vs. C. of N. J. R. R., 35 I. C. C. Rep. 488.

Pacific Navigation Co. vs. S. P. Co., 31 I. C. C. Rep. 472.

Decatur Navigation Co. vs. L. & N. R. R. Co., 31 I. C. C. Rep. 281.

Augusta & Savannah S. S. Co. vs. Ocean S. S. Co., 26 I. C. C. Rep. 380, 384.

See also, this chapter, section 15, sub-(5), "Establishment of Through Route May Be Required with Water Line," post.

§ 13. What Constitutes a Joint Rate.

A joint rate is construed to mean a rate that extends over the lines of two or more carriers and is made by agreement between such carriers.

The provisions of section 1 of the Act to Regulate Commerce, requiring carriers to establish through routes, must be read in conjunction with the latter part of section 3 and section 15, and that the duty thus imposed may not be subjected to too narrow a construction, these provisions must also be read with regard to the intendment of the Act as a whole.

I. C. C. Tariff Circular 18-A, page 3, par. 4.

Flour City S. S. Co. vs. Lehigh Valley R. R. Co., 24 I. C. C. Rep. 179, 185.

§ 14. Division of Joint Rate.

The Commission is empowered by the Act to prescribe the divisions of joint rates applicable to through routes established by order of the Commission, or otherwise,

where the participating carriers fail to agree among themselves upon the apportionment of such rates.

In the Galveston Case, decided shortly after the amendment of 1906, the Commission, in giving construction to this part of the statute, expressed doubt as to its power to establish divisions of rates not fixed by it.

Act to Regulate Commerce, section 15.

In re Wharfage Charges, Galveston Wharf Co., 23 I. C. C. Rep. 535, 547.

Giving to the words "or otherwise" their full legal significance, as they appear in the statute, no other conclusion can be reached but that the jurisdiction of the Commission is complete over the division of joint rates where there is a failure of the carriers to agree upon their apportionment.

It was said in the Star Grain & Lumber Company Case, "that the phrase, 'the just and reasonable proportion of such joint rate to be received by each carrier,' necessarily implies that it is the duty of the Commission in fixing divisions to take into consideration all of the circumstances, conditions, and equities that are necessary to arrive at what is a fair and proper adjustment of the situation as between the two roads, and precludes the idea that joint rates must be divided between the participating carriers on a mileage or any other fixed basis."

Star Grain & Lumber Co. vs. A. T. & S. F. Ry. Co., 14 I. C. C. Rep. 364, 370.

It is well settled that a disagreement between carriers as to divisions does not justify cancellation of joint rates or withdrawal of through routes, nor is a disagreement between carriers as to division of rates in itself any justification for an increase in rates. Thus, in the Lake-and-Rail cases, it was held that the mere fact of disagreement between carriers as to divisions did not prove that the

joint rates were unreasonable or that the routes over which they applied should be abandoned. On the other hand, the Commission held that the carriers in interest should have made further endeavor to agree.

- Lake & Rail Rate Cancellations, 38 I. C. C. Rep. 201, 202.
 Passenger Fares from Milwaukee, Wis., 38 I. C. C. Rep. 98, 100.
 Coal to Ky. points, 37 I. C. C. Rep. 194, 197.
 In re Lumber Rates, 27 I. C. C. Rep. 6.
 Truckers Transfer Co. vs. C. & W. C. Ry. Co., 27 I. C. C. Rep. 275, 279.
 Rates on Corn Milled at Oneonta, N. Y., 27 I. C. C. Rep. 367, 369.
 Board R. R. Commissioners of Montana vs. D. & R. G. R. R. Co., 27 I. C. C. Rep. 522, 524.
 Chamber of Commerce, Newport News vs. Sou. Ry. Co. 23 I. C. C. Rep. 345, 356.
 Germain vs. N. O. & N. E. R. R. Co., 17 I. C. C. Rep. 22, 24.
 Louisville Board of Trade vs. I. C. & S. Tract. Co., 34 I. C. C. Rep. 640.
 Coal Rates from Oak Hills, Colo., 35 I. C. C. Rep. 456.
 Rates on Lumber & Other Forest Products, 30 I. C. C. Rep. 371, 372.
 People's Fuel & Supply Co. vs. G. T. W. Ry. Co., 30 I. C. C. Rep. 657.
 New Mexico Coal Rates, 28 I. C. C. Rep. 328.
 Missouri River-Illinois Wheat and Flour Rates, 27 I. C. C. Rep. 286.
 Texas Cement Plaster Co. vs. St. L. & S. F. R. R. Co., 26 I. C. C. Rep. 508, 510.
 Advances on Ground Iron Ore, 26 I. C. C. Rep. 675.
 West Pullman and Southern Railroad Co. case, 37 I. C. C. Rep. 408, 415.
 Delray Salt Co. vs. C. St. P. M. & O. Ry. Co., 16 I. C. C. Rep. 507, 511.
 Celina Mill & Elevator Co. vs. St. L. & S. W. Ry. Co., 15 I. C. C. Rep. 138, 142.
 Gentry vs. A. T. & S. F. Ry. Co. 13 I. C. C. Rep. 171, 172.
 Star Grain & Lumber Co. vs. A. T. & S. F. Ry. Co., 14 I. C. C. Rep. 364, 370.
 Sou. Pac. Co. vs. I. C. C., 200 U. S. 536, 553, 50 L. Ed. 585, 593.

See also:

- Memphis & L. R. R. Co. vs. Sou. Exp. Co., 117 U. S. 1, 29 L. Ed. 791.
 Reno Grocery Co. vs. S. P. Co., 23 I. C. C. Rep. 400, 401.
 Stacy & Sons vs. O. S. L. R. R. Co., 20 I. C. C. Rep. 136, 139.
 Beekman Lumber Co. vs. M. C. R. R. Co., 21 I. C. C. Rep. 276, 279.
 Re Divisions of Joint Rates on Coal, 22 I. C. C. Rep. 51, 53.
 Youngblood vs. T. & P. Ry. Co., 21 I. C. C. Rep. 569.

Fla. Mer. Agency vs. P. R. R. Co., 21 I. C. C. Rep. 85, 87.
Board of Trade of Chicago vs. A. C. R. R. Co., 20 I. C. C. Rep.
504.
Re Restricted Rates, 20 I. C. C. Rep. 426, 429, 432.
Loup Creek Colliery Co. vs. Va. Ry. Co., 12 I. C. C. Rep. 471.

Compare :

In re Enterprise Transp. Co., 11 I. C. C. Rep. 587.
Clark Co. vs. L. S. & M. S. Ry. Co., 11 I. C. C. Rep. 558.
Commer. Club of Omaha vs. C. R. I. & P. Ry. Co., 6 I. C. C.
Rep. 647.
In re Application of F. W. Clark, 3 I. C. C. Rep. 649, 2 I. C. C.
Rep. 797.

§ 15. Jurisdiction of Interstate Commerce Commission Over Through Routes and Joint Rates.

The power of the Commission to establish through routes under the statutory provisions can be exercised only over carriers subject to the Act to Regulate Commerce. Primarily the Act requires the carrier subject thereto, in the first instance, to establish through routes and joint rates, and by section 15 of the Act empowers the Commission to establish such through routes and joint rates upon the failure of the carriers so to do. The Commission must first be applied to in the matter of the failure of the carriers to establish and maintain through routes and joint rates and the unjust discrimination resulting therefrom, before the courts may entertain jurisdiction, either criminally or civilly. This jurisdiction extends to and includes a water line when it is one of the carriers involved in the through route.

The Panama Canal Act has extended the jurisdiction of the Commission over transportation by water and empowers the Commission to establish through routes and maximum joint rates between and over rail and water lines, determining all the terms and conditions under which

such lines may be operated in the handling of through traffic.

- Truckers Transfer Co. vs. C. & W. C. Ry. Co., 27 I. C. C. Rep. 275.
 Augusta & Savannah S. S. Co. vs. O. S. S. Co., 26 I. C. C. Rep. 380.
 Aransas Pass Channel & Dock Co. vs. G. H. & S. A. Ry. Co., 27 I. C. C. Rep. 403, 414.
 Wichita Falls System Joint Coal Rate Cases, 26 I. C. C. Rep. 215, 222.
 U. S. vs. Pacific & A. R. & N. Co., 228 U. S. 87, 33 Sup. Ct. 443, 447.
 Missouri & Illinois Coal Co. vs. I. C. R. R. Co., 22 I. C. C. Rep. 39.
 Int. Com. Com. vs. Humbolt S. S. Co., 224 U. S. 474, 483; 56 L. Ed. 849.
 Re Unreasonableness of rates on meats, 23 I. C. C. Rep. 656.
 Sunderland Bros. vs. St. L. & S. F. R. R. Co., 23 I. C. C. Rep. 259, 261.

Compare:

- C. & C. Tract. Co. vs. B. & O. S. W. R. R. Co., 30 I. C. C. Rep. 486, 490. (Order of Commission enjoined in B. & O. S. W. R. Co. vs. U. S., 195 Fed. Rep. 962.)
 Int. Com. Com. vs. B. & O. R. R. Co. 225 U. S. 326, 57 L. Ed. 1107.

Under the law, prior to the amendment, it was held, in the Northern Pacific Coal Case, that the non-existence of a reasonable or satisfactory through route was jurisdictional, but where there was such through route the Commission had no power to order another route established.

- Int. Com. Com. vs. No. Pac. R. R. Co., 216 U. S. 538; 54 L. Ed. 608.

See also:

- Pac. Coast Lumber Mfrs. Asso. vs. N. P. Ry. Co., 14 I. C. C. Rep. 51, 53.
 Spring Hill Coal Co. vs. Erie R. R. Co., 18 I. C. C. Rep. 508.
 Southern Cal. Sugar Co. vs. S. P. L. A. & S. L. R. R. Co., 19 I. C. C. Rep. 6.
 Cedar Hill Coal & Coke Co. vs. Colorado & Southern Ry. Co., 17 I. C. C. Rep. 479.
 Enterprise Fuel Co. vs. Penn. R. R. Co., 16 I. C. C. Rep. 219. (See 12 I. C. C. Rep. 326).

(1) **Circuitous Routes.** The limitation imposed by the

Act upon the Commission's power to establish through routes was fixed by the amendment of 1910, providing that no carrier, without its consent, may be required to embrace in a through route substantially less than its entire length or of any intermediate railroad operated in conjunction with it or under a common management, ownership, or control. This limitation, however, it has been held, may not be used to create unjust discrimination and violations of other provisions of the Act.

Act to Regulate Commerce, section 15.

Hughes Creek Coal Co. vs. K. & M. R. R. Co., 29 I. C. C. Rep. 671, 679.

The effect of this limitation on the Commission's power was considered in the Meridian Fertilizer Factory Case, where it was said:

"The contention most strongly urged by this defendant in opposition to a change in the rates from Shreveport is that 'a reduction thereof would short-haul our lines and divert the traffic from the industries located thereon to other channels and would violate that equitable provision of the Act to Regulate Commerce (section 15) which limits the Commission in the establishment of joint through rates to the maximum haul of the carriers.' Section 15, however, merely ordains that between two given points a carrier shall not be deprived of a haul which it is capable of providing by a reasonably direct route."

Meridian Fertilizer Factory vs. T. & P. Ry. Co., 26 I. C. C. Rep. 351, 352.

With the exception of this limitation the power of the Commission, while primarily discretionary, seems complete over through routes and joint rates. Under section 15 of the Act, the Commission is authorized to establish through routes and joint rates whenever the carriers themselves have refused or neglected to voluntarily estab-

lish such through routes or joint classification or joint rates, and this provision likewise applies when one of the connecting carriers is a water line.

The Commerce Court in discussing this section of the Act in the **Crane Iron Works Case**, said:

"That this invests the Commission with discretionary power, and was so intended, can not be seriously doubted. Not only is the grant of authority permissive in form but the entire paragraph contemplates the exercise of judgment upon the facts disclosed, and implies the right and duty of the Commission to order or decline to order joint rates, as the circumstances and conditions developed in each inquiry may seem to require. The provision for a hearing upon complaint or the equivalent initiative of the Commission involves the liberty and obligation of the administrative tribunal to decide a controversy of this nature upon its merits with due regard to the interests of both shippers and carriers. In short, it seems clear to us that the question of establishing joint rates or declining to do so rests in the discretion of the Commission, and it is equally clear that the refusal of the Commission in this case was a lawful and proper exercise of that discretion."

Crane Iron Works vs. U. S., 209 Fed. Rep. 238. (This decision was not appealed from.)

Basing its administrative expression on this discretionary power, the Commission has effected a fundamental rule that a line is circuitous beyond the intention of the statute when it exceeds the short line mileage by 15 per cent or more, and it is the reasoning of the Commission that circuitous routes unnecessarily maintained cause wasteful transportation which should be avoided wherever possible.

Rates on Bituminous Coal, 36 I. C. C. Rep. 401, 420.

Bituminous Coal Rates, 39 I. C. C. Rep. 378, 390.

Rates on Tropical Fruits, 30 I. C. C. Rep. 621, 632.

Class and Commodity Rates from Louisville, 36 I. C. C. Rep. 319.

Cullman Commer. Club vs. L. & N. R. R. Co., 33 I. C. C. Rep. 634, 636.

4th Section Violations in the Southeast, 32 I. C. C. Rep. 61, 67.

Sugar Rates from New Orleans, 32 I. C. C. Rep. 606, 609, 610.

Rates on Sugar, 31 I. C. C. Rep. 495, 502, 510.

Rates on Grain and Grain Prods., 31 I. C. C. Rep. 616.

4th Section Violations in the Southwest, 30 I. C. C. Rep. 153.

Rates on Tropical Fruits from Gulf Ports, 30 I. C. C. Rep. 621, 633, 634.

Paducah Board of Trade vs. I. C. C., 29 I. C. C. Rep. 583, 591.

Edwards & Brandford Lumber Co. vs. C. B. & Q. R. R. Co., 25 I. C. C. Rep. 93, 94.

In re Lumber Rates, 25 I. C. C. Rep. 50, 51.

In re Southern Ry. Co., 25 I. C. C. Rep. 407, 410.

McCullough vs. L. & N. R. R. Co., 25 I. C. C. Rep. 48, 49.

Re Advances on Meats and Packing House Prods., 23 I. C. C. Rep. 656, 662.

Pac. Coast Lumber Mfrs.' Asso. vs. No. Pac. Ry. Co., 14 I. C. C. Rep. 51, 54.

The Commission has given the following general administrative expression to this provision of the Act:

Section 15 of the Act merely reads to all practical intents and purposes that between two given points a carrier shall not be deprived of a haul which it is capable of providing by a reasonably direct route.

Meridian Fertilizer Factory vs. T. & P. Ry. Co. et al., 26 I. C. C. Rep. 351, 352.

Public necessity for a through route may exist, but a through route does not always necessitate joint rates, since the route may be open to traffic upon the payment of a combination of local rates.

Baer Bros. & Merc. Co. vs. Mo. Pac. Ry. Co., 17 I. C. C. Rep. 225, 226.

Where a through route exists the Commission cannot award damages for the failure of other carriers to effect a through route and joint rate via which the shipment in question might have moved.

Edison Portland Cement Co. vs. D. L. & W. R. R. Co., 20 I. C. C. Rep. 95, 97.

A rail carrier, by participating in a through route between two termini, only one of which is reached by its rails, in fact serves both termini and may compete within the meaning of section 5 of the Act with steamers operating as part of another through route between the same termini.

Peninsular & Occidental S. S. Co., 37 I. C. C. Rep. 432, 434.

The prohibition of section 15 prevents the Commission from entering an order embracing in any through route substantially less than the entire length of a carrier's line.

Cement Rates from Mason City, 30 I. C. C. Rep. 426, 430.

Concentration of Cotton at Points in Arkansas, 29 I. C. C. Rep. 106, 108.

Wichita Board of Trade vs. A. & S. Ry. Co., 29 I. C. C. Rep. 376, 379.

Marble Rates from Vermont Points, 29 I. C. C. Rep. 607, 608.

Lumber Rates from Oregon and Washington, 29 I. C. C. Rep. 609, 617.

Campbell's Creek Coal Co. vs. A. A. R. R. Co., 29 I. C. C. Rep. 682, 690.

Rate on Cotton Seed and its Products, 28 I. C. C. Rep. 219, 221.

If it is proposed to cancel an existing route, it is proper to consider whether or not the Commission could have required the establishment of the route as an original proposition.

Ocean-and-Rail Rates to Charlotte, N. C., 38 I. C. C. Rep. 405, 410.

(2) Voluntary Establishment of Through Routes.

While at common law a common carrier was not compelled to accord traffic coming off the rails of other carriers and not originating on its own line, necessary facilities for through movement, under the provisions of the Act to Regulate Commerce, as amended June 29, 1906, common carriers are required to enter into through

routes and furnish the necessary facilities for the through movement of interstate traffic.

Cedar Hills, etc., Co., et al., vs. C. & S. Ry. Co., et al., 17 I. C. C. Rep. 479, 480.

See:

Frt. Bu., etc., vs. M. V. R. R. Co., 13 I. C. C. Rep. 243.

Cardiff Coal Co., vs. Chicago, etc., Ry. Co., 13 I. C. C. Rep. 460.

Chamber of Commerce vs. Chicago, etc., Ry., etc., Co., 15 I. C. C. Rep. 460.

Standard, etc., Co. vs. C. V. R. R. Co., 15 I. C. C. Rep. 620.

Shipments sent through to destination, without intervention of shippers at junction points, constitute an arrangement for through and continuous carriage which clearly brings the transportation within the scope of the Act to Regulate Commerce.

Baer Bros., etc., Co. vs. Mo. Pac. Ry. Co. et al., 17 I. C. C. Rep. 225, 226.

The Commission has held that where no joint through rate is in effect the combination of separately established rates via the route of movement constitutes the through rate, and that such through rate is as binding, definite, and absolute as a joint through rate.

S. T. Fish & Co. vs. N. Y., etc., R. R. Co. et al., 19 I. C. C. Rep. 452.

See **Re** Through Routes and Through Rates, 12 I. C. C. Rep. 163.

There is no through route and joint rate where one of the connecting roads does not file tariffs with the Commission.

S. T. Fish & Co. vs. N. Y., etc., R. R. Co. et al., 19 I. C. C. Rep. 452, 453.

By forming through routes and publishing through rates applicable thereto, both of the interested carriers were held to have merged their lines into one route or line so far as the particular traffic covered by such through route and through rates was concerned.

Rates on Grain Milled in Transit, 35 I. C. C. Rep. 27, 32.

(3) **The Commission May Compel the Establishment of Through Routes.** Much stress has been laid upon the limitation as to the character of the through route prescribed by the amendment of 1910, to the effect that no common carrier without its consent may be required to embrace in the through route substantially less than the entire length of its railroad or of any railroad operated in conjunction therewith or controlled thereby. Aside from this limitation the Commission has full power to require the establishment of through routes, but even this limitation may not be used to discriminate in violation of any provision of the Act, nor as a protection to the carrier in the charging of unreasonable rates. The Commission has well expressed its attitude towards the administration of this power by saying that "the railroads of the country are called upon to so unite themselves that they will constitute one national system; they must establish through routes; keep these routes open and in operation; furnish the necessary facilities for transportation; make reasonable and proper rules of practice as between themselves and the shippers, and as between each other."

Truckers Transfer Co. vs. Charleston & Western Carolina Ry. Co., 27 I. C. C. Rep. 275, 277.

Meridian Fertilizer Factory vs. T. & P. Ry. Co. et al., 26 I. C. C. Rep. 351, 352.

Missouri & Illinois Coal Co. vs. I. C. R. R. Co., 22 I. C. C. Rep. 39, 46.

See also:

Hughes Creek Coal Co. vs. K. & M. Ry. Co., 29 I. C. C. Rep. 671, 679.

(4) **The Establishment of Through Routes May Be Required with Electric Railway.** An electric railway, when operated as a common carrier subject to the Act, is entitled to through routes and joint rates. In the interpretation of the law by the Commission to the effect that

a certain traction company's line was not a lateral branch road, the Commission denied the application of the traction company for the establishment of a through route.

The Supreme Court of the United States reversed this holding by ruling that electric railways operating as common carriers of interstate traffic are entitled to through routes and joint rates.

United States vs. B. & O. R. R. Co., 226 U. S. 14, 57 L. Ed. 104.

(5) Establishment of Through Route May Be Required with Water Line. The Commission has held that by virtue of the obvious effect and meaning of the words "or otherwise," in the Panama Canal Act, it has authority to establish through routes with a water carrier.

Section 11 of the Panama Canal Act, which amends section 6 of the Act to Regulate Commerce, embraces the following provision:

"When property may be or is transported from point to point in the United States by rail and water through the Panama Canal or otherwise, the transportation being by a common carrier or carriers, and not entirely within the limits of a single State, the Interstate Commerce Commission shall have jurisdiction of such transportation and of the carriers, both by rail and by water, which may or do engage in the same, in the following particulars, in addition to the jurisdiction given by the Act to Regulate Commerce, as amended June eighteenth, nineteen hundred and ten:

* * * * *

"To establish through routes and maximum joint rates between and over such rail and water lines, and to determine all the terms and conditions under which such lines shall be operated in the handling of the traffic embraced."

The contention was raised that the words "or otherwise" modify the phrase "by rail and water," and not

the phrase "through the Panama Canal." The Commission declined to accept this construction of the words "or otherwise," and stated that the plain, every-day reading of the Act is "through the Panama Canal or otherwise," and that the words "or otherwise" would be pure surplusage if not so read. The Commission therefore held that it had jurisdiction to establish through routes and joint rates with water carriers.

Augusta & Savannah Steamboat Co. vs. Ocean Steamship Co.,
26 I. C. C. Rep. 380.

See also:

Ind. Transp. Co. vs. Gr. Rapids, Holland & Chicago Ry., 39
I. C. C. Rep. 757.

Port Huron & Duluth Steamship Co. vs. Pennsylvania R. R.
Co., 35 I. C. C. Rep. 475.

Decatur Navigation Co. vs. Louisville & Nashville R. R. Co.,
31 I. C. C. Rep. 281.

(6) **"Railroads of Different Character" Defined.** In the establishment of a through route the authority of the Commission is limited by the provision in section 15 that it "shall not, however, establish any through route, classification, or rate between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business and railroads of a different character." In this connection "railroads of a different character" mean railroads whose motive power is steam as contradistinguished from electricity.

Kansas City, Mo., and Kansas City, Kans. vs. Kansas City Viaduct & Terminal Railway Co., 24 I. C. C. Rep. 22, 26.

§ 16. Joint Rates Compared with Through Rates.

The term "joint rate" as used by the Commission in its tariff regulations is construed to mean a rate that extends over the lines of two or more carriers and is made

by agreement between such carriers, both as to its unity and divisions.

A "through rate" is the net rate between the point of origin and the point of destination. It may be composed of several local or intermediate rates applicable to the separate hauls of the several carriers participating in and constituting the through route of the shipment.

A joint rate when duly established and in force, becomes the only lawful rate for through transportation and supercedes any through rate made up of a combination of the intermediate rates.

Section 15 of the Act to Regulate Commerce as amended, confers upon the Commission power to establish joint rates applicable to through routes established by it and to prescribe the divisions of such rates in the event the carriers refuse or neglect to establish through routes or joint rates. The power thus vested in the Commission to establish joint rates is complementary to its authority to establish through routes and necessary to make such routes workable for the shipping public.

I. C. C. Tariff Circular 18-A, Rule 55.

S. P. Co. vs. I. C. C., 200 U. S., 536.

Sunderland Bros. Co. vs. S. L. & S. F. R. R. Co., 23 I. C. C. Rep. 259, 261.

See also, this chapter, section 13, "What Constitutes a Joint Rate," *ante*.

§ 17. Changes in Rates Do Not Affect Traffic in Course of Through Transportation.

The only lawful rate which may be applied to an interstate shipment is the legal rate in effect at the time the shipment is delivered to the carrier. So, if the movement be over the lines of two or more carriers, the through or joint rate, whichever be in effect at the time the originat-

ing carrier receives the shipment, is the only legal rate applicable.

§ 18. When Changes in Rates May Affect Traffic in Course of Transportation.

If a shipment moves over the lines of two or more carriers who have made no arrangement, express or implied, for a through route, then the transportation is not "through" and its movement as a unit is displaced by a series of successive movements over the individual lines, and, in this event, the shipment is subject to any legal changes in rates of a successive carrier which become effective before the shipment passes into the possession of such successive carrier.

Brady vs. P. R. R. Co., 2 I. C. C. Rep. 131, 2 I. C. Rep. 78

§ 19. Right of Shipper to Reasonable Through Rates.

The Commission has said that it may be laid down as a general rule admitting of no qualification, that a manufacturer or merchant who has traffic to move and is ready to pay a reasonable rate for the service is entitled to have it moved and to have reasonable rates established for the movement, regardless of the fact that the revenues of the carrier may be reduced by reason of the shipper's competition with other shippers in the distant markets; and under all ordinary conditions he is entitled also to have the benefit of through routes and reasonable joint rates to such distant markets if no "reasonable or satisfactory" through routes already exist.

Cardiff Coal Co. vs. C. M. & St. P. Ry. Co., 13 I. C. C. Rep. 460, 467.

The power of the Commission, under the amended fifteenth section, is now absolute to establish through routes

and joint rates, and the non-existence of reasonable or satisfactory through routes is no longer a condition precedent to its exercise.

§ 20. Through Rates—Combination of Joint Rate to Common Points and Local Rate Beyond.

In order to secure uniformity in practice and understandings and to remove the cause of many complaints, the Commission has held that when a joint through rate is the same to two or more points and the rate on a through shipment to a local station to which no specific joint through rate applies is made up by combination of such joint through rate to common points and local rate beyond, the rate for through shipment must be determined by calculating the joint through rate to the point from which the lower local rate applies to point of destination and adding thereto such local rate. For example: Joint through tariff names the same rates from certain eastern points to Chicago and Milwaukee. If shipment is destined to a point to which the local rate is less from Milwaukee than from Chicago, the rate applied should be the joint through rate to Milwaukee plus the local rate from Milwaukee to destination, and unless the lines of the delivering carrier reach both Chicago and Milwaukee the shipment should move via Milwaukee. If the local rate from Chicago to point of destination is lower than from Milwaukee, the rate should be the joint through rate to Chicago plus the local rate from Chicago to destination, and unless the lines of the delivering carrier reach both Milwaukee and Chicago the shipment should move via Chicago.

Rates for outbound through movements from such local stations and under like circumstances must be applied on the same basis, where the joint through rates are the same from two or more points.

This does not authorize any carrier to apply to transportation over its lines any rate except that stated in its own lawfully published tariffs or in the lawfully published joint tariffs in which it has concurred. If a carrier desires to "meet the rate" of a competitor, it must do so by lawfully including in its own tariffs such specific rates, proportional or otherwise, as may be necessary so to do.

I. C. C. Conference Rulings, Bulletin No. 6, Ruling No. 215.
See also Rulings Nos. 195 and 214.

It is suggested that shippers can assist in avoiding mistakes and misunderstandings by calling attention to the rate that should apply in such cases as come under this rule, by indicating it on shipping bill in connection with routing instructions; for instance, "Rate on Milwaukee." This is, however, merely a suggestion by the Commission, and does not relieve the agents of carriers from the responsibility of quoting and applying the correct lawful rate.

This rule does not apply where a shipment has reached destination as originally given by shipper and has been reconsigned, except when tariff contains reconsigning rule that provides for such application.

This rule must not apply in any case where there is an applicable specific joint through rate from point of origin to point of destination.

I. C. C. Tariff Circular No. 18-A, Rule No. 55.

I. C. C. Confr. Rulings Bull. No. 6, Ruling No. 215.

Larrowe Milling Co. vs. C. & N. W. Ry. Co., 17 I. C. C. Rep. 443.

Larrowe Milling Co. vs. C. & N. W. Ry. Co., 17 I. C. C. Rep. 548.

Rehberg & Co. vs. Erie R. R. Co., 17 I. C. C. Rep. 508.

§ 21. Basing Points or Factors for Combination Rates May Be Specified.

Carriers are permitted to provide in tariffs that, in the absence of a specific rate from point of origin to destination for a through shipment, the combination rate to or

via basing points, or, the combination rate specified in certain tariffs, will be the lawful rate for the shipment.

If the shipment moves to or from a point of origin or destination or via a junction point with connecting or branch line at which interchange is made directly intermediate to the base point upon which the lowest combination makes, such combination must be applied; and it is not necessary to haul the shipment to such base point and back again to or through point of origin or destination or such junction point.

CHAPTER VII.

ACT TO REGULATE COMMERCE AS AMENDED (CONTINUED).

Amplification of Sections.

- § 1. Amplification of Section 1 as Amended (Continued)—Reasonableness of Rates.
- § 2. Interrelationship of Sections 1, 3, 4, and 15, respecting Reasonableness of Rates.
- § 3. Original Jurisdiction of the Interstate Commerce Commission.
- § 4. What Constitutes a "Reasonable Rate?"
- § 5. Reasonableness of Rates per se.
- § 6. Relative Reasonableness of Rates.
- § 7. Courts on the Reasonableness of Rates.
- § 8. The "Minimum Rate" Bogey.
- § 9. Interblending of State and Interstate Rates.
- § 10. Presumption of Reasonableness of Rates.
- § 11. Powers of Interstate Commerce Commission not Contravened by Shipping Act.

CHAPTER VII.

ACT TO REGULATE COMMERCE AS AMENDED (CONTINUED).

Amplification of Sections. (Continued.)

§ 1. Amplification of Section 1 as Amended (Continued)— Reasonableness of Rates.

The charge of the common carrier for its service both at common law and under the Act to Regulate Commerce is required to be just and reasonable. This is a principle of law arising from the extraordinary franchise rights and practical monopoly incident to the business of common carriage. The first section of the Act to Regulate Commerce provides that "all charges made for any service rendered or to be rendered in the transportation of passengers or property and for the transmission of messages by telephone, telegraph, or cable, * * * or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful." This provision of the Act has direct reference to the "transportation" services defined in this same section of the Act, and therefore means that all charges made for any service in connection with the interstate transportation of passengers or property, the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration, icing, storage, and handling of property transported, demurrage, and terminal services, and for the transmission of messages by telephone, telegraph, and cable must be just and reasonable.

This requirement that the carrier's charge shall be just

and reasonable is a right in the public, springing from the common law, statutorily extended into concurrent conformity with the aggregate purpose of the Act. Hence, the charge for any service rendered by a common carrier incident to the transportation of persons or property must be just and reasonable, and to this rule no proper exception lies.

In the *St. Louis Hay & Grain Company Case*, the Supreme Court of the United States, reversing the Commission and the lower courts, held that common carriers were entitled to compensation in addition to the actual expense incurred for the service rendered in stopping goods in transit.

Southern Railway Co. vs. St. Louis Hay & Grain Co., 214 U. S. 297, 53 L. Ed. 1004.

The most difficult problem confronting the regulating authority is that of determining what is a just and reasonable charge for transportation. The wording of the Act presumes such a determination, but in the practical administration of the law such an economic status of a rate is possible only of relative determination.

The inquisitorial powers of the Commission have never achieved more than approximations of reasonableness. Rate making is not an exact science and the difficulties encountered by the Commission in administering this all-important mandate of the Act were well expressed in its own language in the 1910 *Western Rate Advance Case*, where, in speaking of the issue of unreasonableness, it said:

“Our laws do not seek to establish dominion over private capital for any other purpose than to make sure against injustice being done the public, and thereby make such capital itself more secure. We are dealing here with a difficult problem, involving

multitudinous facts and an infinite variety of modifying conditions, which make the establishment of principles and the framing of policies a matter of slow evolution. Congress has laid down a few rules. These rules we are attempting to apply. It is not for us to say that we represent the Government and may have a policy of our own which in any degree runs counter to the power granted to us or the duty imposed upon us. The railroads may not look to this tribunal to negative or modify the expressed will of the legislature. They have laid before us the facts and law which would make for a justification of their course in the increasing of rates. To our minds their justification has not been convincing."

1910 Advances in Rates—Western Case, 20 I. C. C. Rep. 307, 379.

In its report in the 1915 Western Rate Advance Case, recurring to the same issue again before it, the Commission expressed itself as follows, relative to the difficulty of exactly determining the reasonableness of transportation rates:

"The problem of estimating the cost of transporting specific commodities is at best in a developmental stage. Progress has been made in this field, however, and the effort to attain to a more thoroughly tested and a more comprehensive method of such specific cost accounting deserves every encouragement. Rate making in the past has not been prosecuted parallel with comparative cost studies. The competition of markets, of producers, and of rival carriers, especially by water, has resulted in a freight rate system which can not be assumed to be so adjusted that the rates effective result in earnings proportioned nicely to the respective costs involved. Where bare expenses are covered by the rate and an increase would kill the traffic, commercial necessities may make the rate the best paying rate on that commodity which the carrier can obtain. The margin of profit

on a particular kind of traffic may be relatively small, and at the same time practical commercial exigencies may prevent the carrier from proposing increases on the traffic in question. Another variety of traffic may be yielding a relatively high return and yet afford a practical opportunity, without raising the rate thereon to an unreasonable or extortionate level, of obtaining needed additional revenue."

1915 Western Rate Advance Case, 35 I. C. C. Rep. 497, 561, 562.

§ 2. Interrelationship of Sections 1, 3, 4, and 15, Respecting Reasonableness of Rates.

That there is an interrelationship between the mandate of reasonableness in the first section of the Act and the prohibition of the third section, is apparent from a comparison of the elements of reasonableness under the former section with the nature of rates which may give rise to the discriminations forbidden by the latter section. Section 3 prohibits the giving of any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or the subjecting of any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage, in any respect whatsoever, or discriminating by common carriers, subject to the Act, in their rates and charges between connecting lines. Thus, it is obvious that a rate which is reasonable *per se* (i. e., in and of itself) under the provisions of section 1 of the Act may violate the third section by affording undue preference or disadvantage to an individual, locality, or particular description of traffic. On the other hand, facts which affirmatively show the existence of an unlawful discrimination or prejudice may in no wise reach to the question

of the reasonableness of the rate *per se*. Still further, however, it may, where a certain state of facts determines the rate to be unreasonable *per se*, be shown by the same set of facts that the rate is also unduly prejudicial. This legal relationship of the two sections has been given cognizance by the courts in holding that the unreasonableness of a rate under section 1 cannot be established solely by proof of a violation of the third section.

As we have seen under the provisions of section 3, there may not be discrimination in rates between localities, but this prohibition may fundamentally affect the reasonableness of rates, and in section 4 this principle is extended so as to prohibit the farther point being given an undue advantage over that point which is nearer to the point of origin.

In the Matter of Advances in Rates on Coal, 22 I. C. C. Rep. 604, 613.

I. C. C. vs. N. C. & St. L. R. Co., 120 Fed. Rep. 934.

It should, therefore, be borne in mind that in attacking rate under section 1 the violation to be established is that of unreasonableness without reference to its relationship with other rates or practices involving a discrimination, but where the rate is attacked upon both grounds—that of its unreasonableness and its discriminatory effect, there must be sufficiency of facts to prove the violation of section 1 as well as the violation of the third section.

The amended fifteenth section of the Act provides that whenever, after full hearing upon a complaint made as provided in section 13 of the Act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative (either in extension of any pending complaint or without any complaint whatever), the Commission shall be of opinion that any individual or joint rates or charges whatsoever demanded,

charged, or collected by any common carrier or carriers subject to the provisions of the Act for the transportation of persons or property or for the transmission of messages by telegraph or telephone as defined in the first section of the Act, or that any individual or joint classifications, regulations, or practices whatsoever of such carrier or carriers subject to the provisions of the Act, are unjust or unreasonable or unjustly discriminatory, or unduly preferential or prejudicial or otherwise in violation of any of the provisions of the Act, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged, and what individual or joint classification, regulation, or practice is just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds the same to exist, and shall not thereafter publish, demand, or collect any rate or charge for such transportation or transmission in excess of the maximum rate or charge so prescribed, and shall adopt the classification and conform to and observe the regulation or practice so prescribed.

Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders, without answer or other formal pleading by the interested carrier or carriers, but upon reasonable

notice, to enter upon a hearing concerning the propriety of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule, and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than one hundred and twenty days beyond the time when such rate, fare, charge, classification, regulation, or practice would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order in reference to such rate, fare, charge, classification, regulation, or practice as would be proper in a proceeding initiated after the rate, fare, charge, classification, regulation, or practice had become effective: provided, that if any such hearing can not be concluded within the period of suspension, as above stated, the Interstate Commerce Commission may, in its discretion, extend the time of suspension for a further period not exceeding six months. At any hearing involving a rate increased after January first, nineteen hundred and ten, or of a rate sought to be increased after the passage of the Act, the burden of proof to show that the increased rate, or proposed increased rate is just and reasonable shall be upon the common carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

The Commission may also, after hearing, on a complaint or upon its own initiative without complaint, establish

through routes and joint classifications, and may establish joint rates as the maximum to be charged and may prescribe the division of such rates as hereinbefore provided and the terms and conditions under which such through routes shall be operated, whenever the carriers themselves shall have refused or neglected to establish voluntarily such through routes or joint classifications or joint rates; and this provision shall apply when one of the connecting carriers is a water line. The Commission shall not, however, establish any through route, classification, or rate between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business and railroads of a different character, nor shall the Commission have the right to establish any route, classification, rate, fare, or charge when the transportation is wholly by water, and any transportation by water affected by this Act shall be subject to the laws and regulations applicable to transportation by water.

And in establishing such through route, the Commission shall not require any company, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith which lies between the termini of such proposed through route, unless to do so would make such through route unreasonably long as compared with another practicable through route which could otherwise be established.

Under the powers thus vested in the Commission it has conducted extensive investigations into the reasonableness of express and freight rates. In the 1915 rate advance cases it searched the financial affairs of the carriers for

the determining cause for the alleged necessity of the carriers for additional revenues. In this respect the power of the Commission is exclusive and unreviewable by the courts.

1915 Western Advance Rate Case, 35 I. C. C. Rep. 497, 501.

The Five Per Cent Case, 31 I. C. C. Rep. 351.

Central Commercial Co. vs. L. & N. R. R. Co., 27 I. C. C. Rep. 114, 115.

Wickwire Steel Co. vs. N. Y. C. & H. R. R. Co., 27 I. C. C. Rep. 168, 169.

In re Wool, Hides and Pelts, 25 I. C. C. Rep. 675, 676.

Porter vs. St. L. & S. F. R. R. Co., 15 I. C. C. Rep. 5.

Morse Produce Co. vs. C. M. & St. P. Ry. Co., 15 I. C. C. Rep. 334, 337.

Leonard vs. K. C. S. Ry. Co., 13 I. C. C. Rep. 573, 578.

The authority granted the Interstate Commerce Commission under section 15 of the Act to prescribe reasonable rates does not confer absolute or arbitrary power to act on any consideration which the Commission may deem best for the public, the shipper, and the carrier. Its order must be based on transportation considerations. While it may give weight to all factors bearing either on the cost or the value of the transportation service, it must disregard as well the demand of the shipper for protection from legitimate competition, domestic or foreign, for unlimited markets, or for the enforcement of equitable estoppels arising from a justifiable expectation that past rates will be maintained, as the demand of the carrier for the maximum rate under which the traffic will move freely.

To be just and reasonable, within the meaning of the constitutional guaranty, the rates must be prescribed by the Interstate Commerce Commission with reasonable regard for the cost to the carrier of the service rendered and for the value of the property employed therein; but this does not mean that regard is to be had only for the interests of the carrier, or that the rates must necessarily

be such as to render its business profitable, for reasonable regard must also be had for the value of the service to the public. And where the cost to the carrier is not kept within a reasonable limit, or where for any reason its business cannot reasonably be so conducted as to render it profitable, the misfortune must fall upon the carrier.

It is obvious that the plain, unmistakable requirement of the law is that traffic shall be subject to just, reasonable, and non-discriminatory rates.

Hammerschmidt & Franzen Co. vs. C. & N. W. Ry. Co., 30 I. C. C. Rep. 71, 82.

A T. & S. F. Ry. Co. vs. I. C. C., 190 Fed. Rep. 591, 594.

M. K. & T. Ry. Co. vs. I. C. C., 164 Fed. Rep. 645, 648.

How the reasonableness and justice of a rate are to be determined is not prescribed by the statute, nor has any satisfactory test been evolved by transportation experts. Conflicts about rates arise from conflicting interests of carriers and shippers. But when a controversy arises between the public and a carrier, the question of the reasonable limit of a rate usually involves many considerations, and is often difficult to determine. A rate that might be regarded as reasonable and just by a producer and shipper, might, from a carrier's standpoint, be deemed extremely unreasonable and unjust, and so, conversely, a rate that a carrier might claim to be reasonable in itself, and which it might support with strong reasons based upon the cost of the service, the quantity of the business and the characteristics of its line of road, might exhaust the greater part of the proceeds of the producer's commodity and be destructive to his interests. It is only stating a truism, therefore, to say there is no recognized test of a rate mutually reasonable for a carrier and for the producer of the traffic.

The reasonableness of a rate must consequently be ascertained in every instance in which the question arises,

by its relations both to the carrier and to the shipper, and by comparison with rates normally charged for like or similar service.

Delaware St. Grange, etc., vs. N. Y., etc., R. R. Co. et al., 4 I. C. C. Rep. 588, 3 I. C. Rep. 554.

The fact that the law requires interstate rates to be just and reasonable does not mean that the rates of one carrier shall be exactly equal to those of another carrier. It is obvious that a rate that might be reasonable for one carrier operating under one set of conditions might be entirely unreasonable for another carrier surrounded by different conditions. The law requires that the charges of each shall be reasonable.

Re Advances on Coal to Lake Ports, 22 I. C. C. R. 604, 625.
Swift & Co. vs. Chicago & Alton R. R. Co., 16 I. C. C. R. 426,
429.
Marley & Son vs. N. & W. Ry. Co., 11 I. C. C. R. 616.

In Corn Belt Meat Producers' Assn. vs. C. B. & Q. Ry. Co., 14 I. C. C. R. 376, 394, the Commission said:

"The interstate rates of this country have not been established upon any consistent theory. They are a process of growth; they have come into existence under the operation of various forces and conditions and are not by deliberate design. With these rates we must deal as we find them. This Commission has no authority to establish general rate schedules. What we take off in one place we can not add in some other. Unless, therefore, the general result of all rates is to yield an undue revenue to the carrier, we should not reduce a particular rate simply because we might think, if establishing that rate *de novo* as part of a general scheme, that it ought to be somewhat lower or somewhat higher in proportion to others. The rate attacked must be so out of proportion as to be unreasonable or must so discriminate as to be

undue or must be unlawful for some other special reason."

See also:

Kindel vs. Adams Ex. Co., 13 I. C. C. R. 475, 485.

Frye vs. No. Pac. Ry. Co., 13 I. C. C. R. 501, 507.

There is no standard by which the cost of the service or the reasonableness of rates can be fixed with any certainty. The rates which the carriers themselves have voluntarily established differ in different sections and at different times. There is almost as wide a difference in the rates established by different commissions after mature consideration.

Beatrice Creamery Co., et al., vs. I. C. R. Co., et al., 15 I. C. C. R. 109, 132.

There is no absolute test of a reasonable rate, and the Government has supplied none. As all authorities in such matters agree, one of the most satisfactory tests of the reasonableness of the rates of one carrier is a comparison with the rates of other carriers operating in the same territory under the same general conditions.

Chamber of Commerce, etc., vs. C. R. I. & P. Ry. Co. et al., 15 I. C. C. R. 460, 466.

City of Spokane et al., vs. No. Pac. Ry. Co. et al., 15 I. C. C. R. 376, 416.

Compare:

Black Mt. Coal Land Co. vs. S. Ry. Co., 15 I. C. C. R. 286, 295.

Kindel vs. N. Y., etc., R. R. Co., 15 I. C. C. R. 555, 558.

§ 3. Original Jurisdiction of the Interstate Commerce Commission.

The mandate of the Act to Regulate Commerce as now amended is that all charges of common carriers subject thereto, for a service rendered or to be rendered in the transportation of passengers or property or in connection

therewith, must be "just" and "reasonable." This is simply a specific enactment into statute by Congress of the common-law requirement that the carriers' charges must be "reasonable" and "just." At the common-law, however, the construction placed on the terms "just" and "reasonable" in connection with transportation charges did not mean that the charges were to be equal to all.

It would be beyond the purpose of this volume to recur to a purely academic discussion of the common-law requirement of common carriers with respect to the reasonableness of their charges, the relations of carrier and shipper out of which such requirement of the common-law sprang, or the practical difficulties attending enforcement of the reasonableness of rates through the courts.

Maximum Rate Case, 167 U. S. 479, 42 L. Ed. 251 (1897).

Granger Cases, 94 U. S. 113, 24 L. Ed. 77 (1887).

Smyth vs. Ames, 169 U. S. 466, 42 L. Ed. 819 (1898).

Windsor Coal Co. vs. C. & A. R. R. Co., 52 Fed. Rep. 716 (1892).

Cook vs. C. R. I. & P. Ry. Co., 81 Iowa 551, 9 L. R. A. 764 (1890).

So. P. R. R. vs. Colorado Fuel & Iron Co., 101 Fed. Rep. 779 (1900).

The early judicial construction of the Act was in many instances not only repugnant to the evident purpose of the legislation, but more or less opposed to the apparent necessities of the statute. It is difficult to escape from the belief that but for the hampering judicial constructions thrown about the administration of the Act prior to 1906, through the practical judicial destruction of the force of the statute, the Commission's regulation of transportation rates and practices respecting their justness and reasonableness would have been accomplished with much more simplicity and effectiveness than may now be hoped for. This is essentially true because of the economic

fusing of industrial, commercial, and transportation conditions in the last few years, preventing the readjustment of transportation charges and practices except as a process of slow evolution.

The amendment of 1906, besides conferring original jurisdiction upon the Commission to entertain proceedings and conduct investigations involving the reasonableness of rates and to pass upon the reasonableness or unreasonableness of existing rates, bestowed upon that tribunal the necessary co-efficient power to determine, fix, and require the observance of reasonable rates as maxima for the future. Thus was created an original authority which the shipper must primarily invoke for redress from the imposition of unjust and unreasonable rates and practices. The affirmative duty of the courts to afford this redress at common law had been negatively exercised, and the question of the right of a shipper to proceed in a court of law for damages against a carrier because of the exaction of a legally published rate alleged to be unreasonable, was presented to the Supreme Court of the United States in the **Abilene Cotton Oil Company Case**, 204 U. S. 426, 51 L. Ed. 553, and in reviewing the exclusive nature of these enlarged powers of the Commission, the court said:

“For if, without previous action by the Commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that unless all courts reached an identical conclusion a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question. Indeed, the recognition of such a right is wholly inconsistent with the administrative power conferred upon the Commission and with the duty,

which the statute casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed."

In addition to the enlargement of its powers to control the reasonableness of rates, the Commission was invested by the amendment of 1910 with the further power to restrain increases in rates for a definitely fixed period, until a determination may be had as to whether the increased rates conform with the statutory requirement of reasonableness or are but evidence of the exercise of an arbitrary power on the part of the carriers.

The power to fix a rate *in futuro* is not a judicial power but a legislative one. The courts are therefore without power to fix rates for the future. The legislative authority has delegated to the Commission the power to fix rates for the future and in the exercise of such extensive authority, the broadest consideration of the economic and financial effect of its orders is justified. While in its every essential an administrative tribunal, the Commission has been termed by the Supreme Court of the United States, an "economic court," or, to give it a more commonplace definition, but one of stricter legal analogy, a select jury to pass upon the reasonableness and justness of transportation rates and practices. Within the broad lines of discretion possessed by the Commission, the courts now regard as final its conclusions on questions of fact affecting rate adjustments and transportation practices.

A review of the Commission's orders, however, is not a procedure equally open to the carrier and shipper. The carrier may apply to the courts for a review of the questions of law involved in proceedings before the Commission, but unless a constitutional guarantee is violated by the order of the Commission its action is final, provided,

of course, it does not overstep the jurisdictional lines established by the statute. But as to the shipper, the Commission is the original tribunal of his remedy against transportation injustice. He may proceed in the courts in review only of a negative order of the Commission dismissing his complaint, otherwise he must restrain his action entirely within the administrative limitations for his redress.

Section 22 of the Act to Regulate Commerce specifically declares that nothing therein contained shall in any way abridge or alter the remedies now existing at common law or by statute, but that the provisions of the Act are in addition to such remedies. This can not be construed as continuing in the shipper common-law rights, the continued existence of which would be repugnant to and inconsistent with the provisions of the Act. It is but logical that a shipper may not complain in the courts against the reasonableness or unreasonableness of a rate which has been filed with the Commission and promulgated in accordance with the requirements of the Act to Regulate Commerce, because such rate is the only legal rate which it is the duty of the carrier to charge and collect under the express mandate of the Act until changed in accordance with the provisions of the Act. So the shipper may not, without previous action by the Commission, maintain actions to obtain pecuniary redress for violations of the Act, conferred by the ninth section, except as to such wrongs as can consistently, with the context of the Act, be redressed without previous action by the Commission.

For, in its most important jurisdictional decision, the Supreme Court said:

"We think that it inevitably follows from the context of the Act that the independent right of an individual originally to maintain actions in courts to

obtain pecuniary redress for violations of the Act conferred by the ninth section must be confined to redress of such wrongs as can, consistently with the context of the Act, be redressed by courts without previous action by the Commission."

- Texas Pac. Ry. Co. vs. Abilene Cotton Oil Co., 204 U. S. 426.
 C. I. & S. Co. vs. K. & M. R. R. Co., 178 Fed. Rep. 261.
 Re Advances in Rates—Western Case, 20 I. C. C. Rep. 307, 313.
 Memphis Freight Bureau vs. K. C. S. Ry. Co., 17 I. C. C. Rep. 90.
 Advance in Rates—Western Case, 20 I. C. C. Rep. 307, 313.

See also:

- Franklin vs. Phila. & R. R. Co., 203 Fed. Rep. 134, 138.
 The New England Investigation, 27 I. C. C. Rep. 560, 616.
 Hampton Mfg. Co. vs. Old Dominion S. S. Co., 27 I. C. C. Rep. 666, 668.
 Coml. Club of Omaha vs. A. & S. R. Ry. Co., 27 I. C. C. Rep. 302, 314, 315.
 New Pittsburgh Coal Co. vs. H. V. Ry. Co., 26 I. C. C. Rep. 121, 126.
 The Transit Case, 24 I. C. Rep. 340, 343.
 St. Louis Blast Furnace Co. vs. V. Ry. Co., 24 I. C. C. Rep. 360, 370.
 Riverside Mills vs. St. L. & S. F. R. R. Co., 24 I. C. C. Rep. 264, 646.

Compare:

- I. C. R. R. Co. vs. Newburg Hill Coal Co., 238 U. S. 275.
 Penna. R. R. Co. vs. Puritan Coal Co., 237 U. S. 121.

See also:

- New York-Jersey City Ferry Rates, 37 I. C. C. Rep. 103, 113.
 Coal Rates from Oak Hills, Colo., 30 I. C. C. Rep. 505, 508.
 The Mississippi River Case, 28 I. C. C. Rep. 47, 39.
 Board of Trade of Carrollton, Ga. vs. C. of Ga. Ry. Co., 28 I. C. C. Rep. 154, 168.
 Boston Chamber of Commerce vs. A. T. & S. F. Ry. Co., 28 I. C. C. Rep. 230, 234.
 Central Commercial Co. vs. L. & N. R. R. Co., 27 I. C. C. Rep. 114, 115.
 Wickwire Steel Co. vs. N. Y. C. & H. R. R. R. Co., 27 I. C. C. Rep. 168, 169.
 Lumber Rates from Memphis and Other Points to New Orleans, 27 I. C. C. Rep. 471, 486.
 In re Wool, Hides and Pelts, 25 I. C. C. Rep. 675, 676.
 Anadarko Cotton Oil Co. vs. A. T. & S. F. Ry. Co., 24 I. C. C. Rep. 327.
 In re Advance of Coal to Lake Ports, 22 I. C. C. Rep. 604, 623.
 In re Advances in Rates—Western Case, 20 I. C. C. Rep. 307.

- Railroad Commission of Wisconsin vs. C. & N. W. Ry. Co., 16 I. C. C. Rep. 85, 89.
- Porter vs. St. L. & S. F. R. R. Co., 15 I. C. C. Rep. 1, 6.
- Abilene Cotton Oil Co. vs. T. & P. Ry. Co., 204 U. S., 426.
- Washer Grain Co. vs. M. P. Ry. Co., 15 I. C. C. Rep. 147, 156.
- Morse Produce Co. vs. C. M. & St. P. Ry. Co., 15 I. C. C. Rep. 334, 337.
- City of Spokane vs. N. P. Ry. Co., 15 I. C. C. Rep. 376, 416.
- Holley Matthews Mfg. Co. vs. Y. & M. V. R. R. Co., 15 I. C. C. Rep. 436, 437.
- Hussey vs. C. R. I. & P. Ry. Co., 13 I. C. C. Rep. 366, 368.
- Leonard vs. K. C. S. Ry. Co., 13 I. C. C. Rep. 573, 578.
- Douglas Co. vs. C. R. I. & P. Ry. Co., 21 I. C. C. Rep. 541.
- Joynes vs. P. R. R. Co., 17 I. C. C. Rep. 361.
- Arkansas Fuel Co. vs. Chicago M. & St. P. Ry. Co., 16 I. C. C. Rep. 95, 96.
- Wholesale Fruit & Produce Ass'n vs. A. T. & S. F. Ry. Co., 14 I. C. C. Rep. 410, 421.
- Railroad Com. of Ohio vs. Wheeling & L. E. Ry. Co., 12 I. C. C. Rep. 398; Rail & River Coal Co. vs. B. & O. R. R. Co., 14 I. C. C. Rep. 86.
- Re Allowances to Elevators, 12 I. C. C. Rep. 85.
- Cattle Raisers' Ass'n vs. Mo. Kan. & Tex. Ry. Co., 12 I. C. C. Rep. 1, 3.
- Hastings Malting Co. vs. Chicago, M. & St. P. Ry. Co., 11 I. C. C. Rep. 675.
- Tift vs. So. Ry. Co., 10 I. C. C. Rep. 548, and Central Yellow Pine Ass'n vs. Ill. Cent. R. R. Co., 10 I. C. C. Rep. 505, where an advance was declared illegal, and Southern Pine Lumber Co. vs. So. Ry. Co., 14 I. C. C. Rep. 195, where the full advance was decided to be the measure of reparation.
- Cary vs. Eureka Springs Ry. Co., 7 I. C. C. Rep. 286, 319.
- Freight Bureau of Cincinnati vs. Cincinnati N. O. & T. P. Ry. Co., 6 I. C. C. Rep. 195, 4 I. C. C. Rep. 592, 617.
- Merchants Union of Spokane Falls vs. N. Pac. Ry. Co., 5 I. C. C. Rep. 478, 4 I. C. C. Rep. 183, 198.
- Murphy, Wasey & Co. vs. Wabash R. R. Co., 5 I. C. C. Rep. 122, 3 I. C. C. Rep. 725, 726.
- Coxe Bro. & Co. vs. Lehigh V. R. R. Co., 4 I. C. C. Rep. 535, 577, 578.
- L. & N. R. R. Co. vs. U. S. 238, U. S. 1.
- I. C. C. vs. L. & N. R. R. Co., 227 U. S. 88.
- So. Pac. Co. vs. I. C. C., 219 U. S. 433.
- So. Pac. Co. vs. I. C. C. 215 U. S. 226.
- I. C. C. vs. C. & A. R. R. Co., 215 U. S. 479.
- I. C. C. vs. I. C. R. R. Co., 215 U. S. 452.
- I. C. R. R. Co. vs. I. C. C., 206 U. S. 441, 454.
- C. H. & D. R. R. Co. vs. I. C. C., 206 U. S. 142, 149.
- I. C. C. vs. C. N. O. & T. P. Ry. Co., 167 U. S. 479.
- C. N. O. & T. P. R. R. Co. vs. I. C. C., 162 U. S. 184.
- T. & P. Ry. Co. vs. I. C. C., 162 U. S. 197.
- L. & N. R. R. Co. vs. I. C. C., 195 Fed. Rep. 541, 564.
- A. T. & S. F. Ry. Co. vs. I. C. C., 190 Fed. Rep. 591, 594.
- L. & N. R. R. Co. vs. I. C. C., 184 Fed. Rep. 118, 122.
- Phila. & R. Ry. Co. vs. I. C. C., 174 Fed. Rep. 687, 688.

- M. K. & T. Ry. Co. vs. I. C. C., 164 Fed. Rep. 645, 648.
Am. Sug. Refg. Co. vs. D. L. & W. R. R. Co., 207 Fed. Rep. 733.
C. & A. R. R. Co. vs. I. C. C., 173 Fed. Rep. 930.
Mo. River Rate Case, 171 Fed. Rep. 680.
Pitcairn Coal Co. vs. B. & O. R. R. Co., 154 Fed. Rep. 108.
Logan Coal Co. vs. P. R. R. Co., 154 Fed. Rep. 497.
So. Pac. Ter. Co. vs. I. C. C., 166 Fed. Rep. 134.
D. L. & W. R. R. Co. vs. I. C. C., 166 Fed. Rep. 498.
Stickney vs. I. C. C., 164 Fed. Rep. 638, 644.
Kiser vs. C. of Ga. Ry. Co., 158 Fed. Rep. 193, 198.
Farmer's L. & T. Co. vs. N. P. R. R. Co., 83 Fed. Rep. 249.
I. C. C. vs. L. V. R. R. Co., 74 Fed. Rep. 784, 787.
I. C. C. vs. L. & N. R. R. Co., 73 Fed. Rep. 409, 414.
I. C. C. vs. Detroit G. H. & M. R. R. Co., 57 Fed. Rep. 1005.
K. & I. Bridge Co. vs. L. & N. R. R. Co., 37 Fed. Rep. 567, 613.
C. & C. Trac. Co. vs. B. & O. S. W. R. R. Co., 20 I. C. C. Rep. 486, 490.
Marshall Oil Co. vs. C. & N. W. Ry. Co., 14 I. C. C. Rep. 210.
Pa. Millers' State Ass'n. vs. P. & Ry. Co., 8 I. C. C. Rep. 531.
Dallas Frt. Bu. vs. M. K. & T. Ry. Co., 12 I. C. C. Rep. 427.
Ashland Fire Brick Co. vs. S. Ry. Co., 22 I. C. C. Rep. 115, 121.
Mobile, etc., vs. M. & O. R. R. Co., 23 I. C. C. Rep. 417, 421.
Cosby vs. Richmond Transfer Co., 23 I. C. C. Rep. 72, 77.
Sunderland Bros. Co. vs. S. L. & S. F. R. R. Co., 23 I. C. C. Rep. 259, 261.
Porter vs. St. L. & S. F. R. R. Co., 15 I. C. C. Rep. 1.
Pacific Coast Lumber Mfrs. Ass'n vs. Nor. Pac. Ry. Co., 16 I. C. C. Rep. 465.
N. Y. C. & H. R. R. Co. vs. I. C. C., 168 Fed. Rep. 131.
Loup Creek Colliery Co. vs. Virginian Ry. Co., 12 I. C. C. Rep. 471.
Southwestern Produce Co. vs. W. R. R. Co., 20 I. C. C. Rep. 458, 461.
Commutation Rate Case, 21 I. C. C. Rep. 428, 429.
Re Rates on Lumber, 21 I. C. C. Rep. 16.
Re Suspension of Rates on Packing House Products, 21 I. C. C. Rep. 68, 70.

§ 4. What Constitutes a "Reasonable Rate"?

What is a reasonable rate? Is a rate unreasonable because it does not pay its full share of taxes, fixed charges, and dividends? At the end this is the question to which we come in a case involving the reasonableness of a rate *per se*. The carriers themselves, having fixed the rates under the mandate of the law that they shall establish just and reasonable rates, have they justified higher rates by a showing that the existing rates which they had thus

established fall short of meeting expenses which the carrier must bear, not only for transportation but to secure an adequate return upon its property?

Let us see where this doctrine would lead to. If a carrier may raise all its rates to a basis where each will bear its share of cost, including all costs, and no lower rate is reasonable, then it must follow that all rates are unreasonable which yield to the carrier a greater return than such cost. Under such a theory what would be the rate on tea or silks, or high-priced horses, or delicate machines? Is there to be no classification of freight excepting upon the basis of cost of transportation plus insurance risk? If so, the tariffs of every railroad in the United States must suffer a revolutionary change.

In all classifications of property for transportation, consideration must be given to what may be termed public policy, the advantage to the community of having some kinds of freight carried at a less rate than other kinds. And this is essentially the only competent meaning of the much-abused phrase, "what the traffic will bear." It expresses the consideration that must be shown by the traffic official to the need of the people for intercourse in certain commodities. He accordingly imposes a higher rate upon what may be termed luxuries as compared with that imposed upon those articles for which there is a more universal demand. He also gives consideration to the fact that the rate so imposed enters into the ultimate price to the consumer to but a small degree when the article is one of high value, and that those in the community who can afford to purchase such article can well afford to pay a rate greater than that which could reasonably be imposed upon the general public for commodities of common use.

In this sense what the traffic will bear and the value

of the service are analogous. No one would claim that a carrier was violating its duty under the law in charging three times the rate upon Oriental rugs that it imposed upon cotton. This would not be undue discrimination as between commodities, even though it costs no more to transport the rugs than it did the cotton, assuming both to be carried at the owner's risk, for the one does not compete with the other, and one of them may reasonably bear a higher rate than the other, without contravening the propriety of public policy.

The Commission, therefore, under the amendment to section 1 passed by Congress in 1910, giving to it the control of freight classification, has power to determine the reasonableness of the differences that are made between the rates made applicable to the various kinds of commodities transported. It may not say that a rate shall be fixed so as to meet the requirements or needs of any body of shippers in their efforts to reach a given market, nor may it establish rates upon any articles so low that they will not return out-of-pocket cost. Neither may it fix an entire schedule of rates which will only yield an inadequate return upon the fair value of the property used in the service given. There is, however, a zone within which it may properly exercise "the flexible limit of judgment which belongs to the power to fix rates." These are the words of the Chief Justice of the Supreme Court of the United States (206 U. S. 26).

There is no flexible limit of judgment if all rates must be upon a level of cost, and out of every dollar paid to the carrier must come a fixed amount of return for capital invested. The recognition of such a doctrine has never been suggested either by Congress or the Supreme Court. A just and reasonable rate must be one which respects alike the carrier's deserts and the character of the traffic.

It can not be a rate that takes from the carrier a profit and thus favors the shipper at the carrier's expense, nor is it one which compels the shipper to yield for the transportation given, a sum disproportionate to the service rendered to the shipper. The words "just and reasonable" imply the application of good judgment and fairness, of common sense, and a sense of justice to a given condition of facts. They are not fixed, unalterable, mathematical terms. Their meaning implies the exercise of judgment, and against the improper exercise of that judgment the Constitution gives protection.

Investigation and Suspension Docket Nos. 26 to 26C., 22 I. C. C. Rep. 604, 623.

The following discussion of the reasonable rate and cost of service, from the report of the Commission in **Advance in Rates—Western Case**, 20 I. C. C. Rep. 307, 347, is of such instructive value as to justify its quotation:

"What is the reasonable rate that shall be charged to the shipper? The legislature may not make rates so as to confiscate the carrier's property. The carrier, on the other hand, may not make rates which are unjust to those who by economic necessity are compelled to employ its services. Here, then, we have the minimum of legislative power and the maximum of the carrier's power. Between these lies a zone, indefinite and variable. Without question the carrier will tend toward the maximum, while governmental authority will be inclined—in fact, has been created—to repress this upward tendency. One moves inevitably upward to the highest rate which the traffic will bear; the other attempts to discover some relation between charge for service and cost of service.

"The present record is full of contrasts between these two lines of tendency. The carriers, for instance, gave the following as their full justification as to the reasonableness of each and all of the proposed

advanced rates in and of themselves: 'In making up the tariff,' said the vice president of the Burlington road (and all other carriers adopted this testimony as their own), 'we considered each individual item, and we made no increase which in our judgment would materially affect the movement of the business or place an undue burden on the traffic. I think that the present rates were originally established to meet in many cases conditions that no longer exist, and that the same necessity from a commercial standpoint does not exist now as it did when the rates were originally established, and that as a rule the value of the commodity is greater, and the shipper and consignee are both better able to pay approximately the same rate today than they were to pay these special commodity rates when they were originally established. We, as I have stated, advanced no rate beyond a figure which in our judgment it could stand and freely move.' A full hearing was extended to all carriers as to the reasonableness from its standpoint of each rate involved, with no further result than this one answer.

"The Supreme Court has said that one of the elements which should be given consideration in the establishment of a reasonable rate was the cost of the service, *Smyth vs. Ames*, *supra*, but this is regarded by railroad men as an almost negligible factor.

"'I think,' said Mr. Ripley, 'that the cost of service is only one of the items to be considered in the making of a reasonable rate, and not a very important item at that—either the cost of service or the returns made on capital. I think that while they may be considered under certain conditions they are remote.' And again, 'I think that the cost of the service has very little consideration in the making of rates. Rates are made without a consciousness on the part of the carrier's agent of the return that these rates will bring.'

"This is the purport of more of Mr. Ripley's testimony, and it is to be remembered in this connection that Mr. Ripley's experience as a traffic manager has

extended from the Atlantic to the Pacific coast and over several great systems of railroad. 'The maker of the rate,' he says, 'in the first instance must make the rate such as to permit of the freest intercourse and the freest interchange of commodities in the country, regardless of capital, regardless of cost—almost regardless of cost, but entirely regardless of capital.' Then being asked as to whether the Commission should make rates after this railroad fashion, he said, 'I think they (the Commission) should consider the value of the service first and foremost and leave the cost and the value of the properties to altogether secondary consideration.' He was asked if he had said that the making of freight rates 'has not, never did have, never will have, never ought to have, any relation to the capitalization of the railroads,' to which he replied that this was a correct expression of his views.

"Discarding the elements of cost and capitalization, he was asked to define a reasonable rate, and replied that it was one that the traffic would bear, 'and the amount that the traffic would bear,' he said, 'is that amount of charge at which it will most freely move over the lines of transportation.' This definition he again repeated when he was asked if the phrase, 'what the traffic will bear,' meant the rate at which the commodities would 'most freely move over the lines of the carrier,' to which he replied, 'I will qualify that by saying, 'What the traffic will bear and still move most freely and enable the products and the manufactures of one part of the country to be used to the utmost possible extent in the other.'

"This is the latest, the most modern, and the most liberal definition of this much-abused phrase. Indeed, it is so liberal that it is impracticable unless properly qualified. Mr. Ripley would not have us understand that a railroad is an eleemosynary institution. To say that a reasonable rate is one under which the traffic will most freely move is to say that it is the rate which casts the least burden upon the shipper. The

rate that will carry the traffic farthest for the smallest amount of money—the lowest possible rate. But all of the time there is present in the mind the necessity of securing out of all of such rates not only the cost of transportation, which Mr. Ripley regards as negligible, but an adequate return upon the value of the property used. While this definition, therefore, sounds to the ear most philanthropic, it was doubtless not intended to convey any more subtle or philosophic meaning than this: That an individual rate should not be made with reference to the cost of the service to the railroad, nor should it be made with regard to the return which it would yield to the capital invested in the plant. It should be made so low that as great a body as possible of that character of traffic should move, but all the time there must be borne in mind the fact that out of its aggregate rates the property must be made to pay. This is the American system of railroad rate making.

“‘What the traffic will bear’ may mean ‘all that the traffic will bear.’ If it means that the rate must be measured by the amount that the shipper is willing to pay under necessity, it is extortion. On the other hand it may mean the least return for which the carrier can afford to transport the traffic. This theory of rate making seems to be that there is a certain amount of traffic which can be developed; that there is a certain volume of traffic which is to be moved, or which can be moved; that the rate should not be so high as to prevent any of this traffic from moving, nor should it be a lower amount than the carrier can obtain and still permit the freest possible movement. Such definition apparently makes the rate entirely a matter of judgment as to which there may be error. And, carried to its last degree, it permits indefinite discrimination between individuals, as well as between communities, for if the rate is to be made so as to permit the freest possible movement one shipper may not be able to extend his market at the rate given to another. Therefore he is entitled to a rebate. And

the more distant community may not be able to compete with the nearer community for a common market. And therefore it is entitled to a lower rate than its more advantageously situated competitor. The experience of the commercial world led to the enactment of the Act to Regulate Commerce which interfered with the full application of this theory, and we, of course, assume that Mr. Ripley stated his principle of rate making, not only with the limitation we have already noted—that rates were to be made so that, as a whole, they yielded adequate return to the carrier—but with the further limitation that they must be subject to the prohibitions of the law. Manifestly, under this principle all that stands between the shipper and extortion is the wisdom and the good sense of the traffic manager who makes the rates. If, in his judgment, it is advisable to carry a small volume of traffic upon a high rate, rather than a large volume of traffic upon a low rate, there is nothing to interfere with this decision, and all the consequences affecting the country at large, excepting now the right of appeal to the Government as represented in this Commission.

“Rates being made upon this theory, the function of the traffic manager is that of a statesman; he determines zones of production and consumption, the profits of the producer and the cost to the consumer; he makes his rates, if he so pleases, to offset and nullify the effect of import duties and determine the extent and character of our foreign markets.

“To make rates for transportation based solely upon the ability of the shipper to pay those rates is to make the charge for transportation depend upon the cost of production rather than upon the cost of carriage—to measure a public service by the economies practiced by the private shipper. This necessarily gives to the carrier the right to measure the amount of profit which the shipper may make and fix its rate upon the traffic manager’s judgment as to what profit he will be permitted. This theory entitles the railroad to

enter the books of every enterprise which it serves and raise or lower rates without respect to its own earnings but solely with respect to the earnings of those whose traffic it carries. This is not regulation of railroads by the nation, but regulation of the industries and commerce of the country by its railroads."

§ 5. Reasonableness of Rates *per se*.

The preceding section is strikingly emphatic of the limited benefits to be derived from a determination of the reasonableness of a rate *per se*. That is, in and of itself, that it does not represent more than the cost of the service plus a reasonable proportionate return upon the value of the carrier's property and that it pays its full share of taxes, fixed charges, and dividends. There are instances, nevertheless, when the conditions of facts warrant the ascertaining of the reasonableness of rates *per se*. The elements of evidence essential to such a hearing have been referred to heretofore. But the mathematical process of determining such value in a rate has not thus far been developed. In fact, it has been strongly intimated that the ascertainment of such values is not possible with practical accuracy. It can not, it is true, be accomplished with precise accuracy, but with very substantial fairness.

On this important phase of rate analysis, the Railroad Commission of Wisconsin, which has given this question searching consideration, said, *In re Rates on Wood Pulp*, Decisions R. R. Com. of Wis., No. 89, pages 57-59:

"To determine even the approximate cost per unit of transportation to the carriers is very difficult, and can only be done through a series of long and complicated calculations, most of which have been explained in former decisions. The first step necessarily involves a separation of the expenses between the different branches of traffic. Complicated as this is,

it is yet our judgment that it can be accomplished with a fair degree of accuracy and in a manner that is fair to all concerned. The next step is to separate the expenses on the basis of which the traffic is handled, that is, between the cost of handling the traffic at the terminal and the cost of moving it between the terminals. In this case, as in the case of separating the expenses between the different branches of traffic, many items are met with which are common to both sides, and which do not readily admit of exact distribution. But even these difficulties may be overcome. Upon close and detailed examinations of the various factors involved, some way can usually be found in which the common items can be fairly and equitably assigned. This is not a matter of opinion merely, but has been shown to be so in actual practice. The next step consists of finding some units upon which the various classes of these expenses, or the terminal and movement costs, can be pro-rated, and the gross and net cost per any given quantity of the traffic determined. The best units for this purpose would seem to be the loaded car. This must necessarily be so since freight is usually handled and moved in carloads. The terminal costs, for instance, may be pro-rated on the number of these cars and the movement expenses on their mileage.

“When the cost per car in turn for terminal expenses is pro-rated upon the freight in the car, the amount of these expenses to each unit of the traffic is obtained. When the cost per loaded car per mile is pro-rated on the weight of both the car and the load, the average cost per gross ton per mile of haul is found. This cost per gross ton, or other unit, can be used as the basis upon which the movement expenses per net ton or other unit is computed. Under these methods it is possible to determine the average cost per net unit of traffic of handling the freight at the terminals, as well as of moving it between the terminals. Furthermore, it is possible from the data as a whole to ascertain these costs under various kinds

of loading or for lighter as well as for heavier loading.

"The fourth step involves such an adjustment of these costs as to apply to local as well as through business. In these operations, however, the terminal expenses are not involved. It is perfectly clear that these costs have no relation to the length of the haul. They appear to be as great for a carload going a hundred miles as for one going five hundred miles. The movement costs, however, vary with the distance and not far from in the same proportion. But the cost of handling way freight which makes frequent stops and slow time is relatively much greater than the cost for through freight or traffic which is moved through from one place to another on faster schedules. To determine the difference in the cost as between through and local traffic, like all other apportionments of expenses, is far from any easy matter, but under a complete analysis of both the expenses and operating conditions it can be done in a manner that would seem to be fair all around.

"In this matter it is possible to obtain approximately correct ideas of the cost per unit to the carrier for handling the traffic. This cost is undoubtedly the most important element in rate-making. This is particularly true since it is possible to ascertain the same for less than carload as well as for carloads, or for both smaller and larger shipments. The value of the products is an element that in importance in this respect is second only to the cost. As already pointed out, articles of high value can fairly bear higher rates than low-priced ones, and in view of this fact it is only just that the charges levied for transportation should be relatively greater in the former case."

It is a rare case where the question of reasonableness of rates *per se* is advanced by the carrier itself in justification of their advance. Such a case occurred, however, in Investigation and Suspension Docket Cases Nos. 26 to 26C, from which we have quoted in the last preceding section, and while the formula suggested by the Wisconsin

Commission was not worked out with the approximate accuracy which might be anticipated, the application of the doctrine is easily followed. The case involved a suspension by the Commission of coal rates applying from the West Virginia coal fields to lake ports, which the Norfolk & Western Railroad Company had attempted to advance. Other lines were also parties to the case because of attempted advances.

From November, 1910, to March, 1911, the Chesapeake & Ohio Railway Company, Baltimore & Ohio Railroad Company, Norfolk & Western Railway Company, the Kanawha & Michigan Railway Company, and their connections, filed with the Commission tariffs advancing their rates upon lake coal, which is coal originating in the West Virginia coal fields and moving during the season of open navigation on the great lakes to various ports on Lake Erie for transshipment by vessels beyond. The Norfolk & Western Railway Company alone justified the advance in rates and in the proceedings before the Commission established, with approximate accuracy, the cost of transporting coal over its lines.

The Norfolk & Western Railway Company had for many years maintained a system similar to that which prevails on the Santa Fe, of making a separation between passenger and freight traffic and allotting to each the separate and distinct charges applicable thereto. These accounts of cost were kept as to each of the divisions of the road extending from Norfolk, Va., on the east, to Columbus, Ohio, on the west. They showed that the carriage of all freight resulted in a cost per ton per mile of approximately 2.28 mills on the line between Bluefield and Columbus, which consisted of the Pocahontas, the Kenova, and the Scioto divisions. The coal transported over this line

amounted to 60 per cent of the entire traffic, 20 per cent being coke and the remaining 20 per cent general merchandise. The per car tonnage factors were, respectively, coal 45, coke 32.2, and general merchandise 17.35 tons per car. The 2.28 mills per ton, cost of moving all freight, included the charge of concentration peculiar to the coal traffic. The estimates of costs for carrying coal on the Bluefield-Columbus line were: Pocahontas Division, 2.905 mills; Kenova Division, 1.691 mills; and the Scioto Division, 1.893 mills per ton per mile. The fair average of these cost factors was 2 mills per ton per mile for the carrying of coal upon the Bluefield-Columbus line, but this was not all of the cost of hauling lake coal, for there had to be apportioned to it a proper share of interest, taxes, and dividends.

Severe contention arose over the fixing of the value of the property used for handling this particular traffic. The book cost of the system was generally accepted as the basis by the experts. While the books revealed the total book cost of the system at \$130,000 per mile of main line, they did not disclose the actual cost of the Bluefield-Columbus line. The carrier contended for a composite figure which so nearly approximated the ton-miles of this portion of the system to the ton-miles of the whole system that this figure was taken as expressing the value of the line from Bluefield to Columbus, which was 48 per cent. The Norfolk & Western Railway Company was, at the time of the hearing, 1,542 miles in length, of main line, and the Bluefield-Columbus line 346 miles in length, of main line. The 346 miles of the Bluefield-Columbus line was credited with 48 per cent of the value of the whole because of the density of its traffic. There was no doubt but that this portion of the road, the very

heart of the system, probably cost more than any other part of the system to construct. The branch lines on this section constituted 56 per cent of the total branch lines of the system, 395 miles. The second track on the Bluefield-Columbus line was 59 per cent of the system's second track of 348 miles; and the sidings were 47 per cent of the system's sidings of 996 miles. Thus was made up a track mileage, Bluefield to Columbus, which was 38 per cent of the total all-track system mileage of 3,283 miles. There was a difference of opinion as to the balancing of all sidings, branches, and second tracks against main-line mileage, and those experts who thought such a balance unfair credited the Bluefield-Columbus line with 34 per cent of the total cost of the system, the figure being arrived at by adding main-line, second-track, and branch-line mileage alone. Thus something less than one-fourth of the main-line mileage was estimated as worth slightly more than one-third of the value of the system. Therefore, to the approximate cost of 2 mills per ton per mile for the hauling of coal over the Bluefield-Columbus line, an additional 1 mill was added in order that the coal on a tonnage basis should bear its full percentage of the taxes, interest, and dividends, distributable to all freight upon this line. This 1 mill was added under the 48 per cent division of cost of the Norfolk & Western Railway Company, but on the 34 per cent basis the addition would have been but 0.75 of a mill. Such an allowance for fixed charges and dividends placed on this lake-cargo coal its full percentage of such costs allotable to all freight and disregarded the value of the commodity hauled and the fact that the rate was made as a portion of a through rate upon traffic moving over the lakes and farther into the northwest by rail, which therefore rendered the charge analogous to a division of

the through rate. It is a commonly expressed belief that two-thirds of a railroad's revenue goes for operating and maintenance expenses and the other third for return upon the plant. This theory was apparently proved by the ratios on the Bluefield-Columbus line; 2 mills for operating and maintenance, and 1 mill for revenue, show how nearly this formula is correct.

It was shown that the freight-operating ratio of the Norfolk & Western Railway Company was 54.72 for the Bluefield-Columbus line, for 1910, and 59.61 in 1911, the all-system ratio in 1910 being 58.54.

The Commission, in its report in this case, announced with particularity its conclusions as to the justification of the Norfolk & Western Railway Company's proposed advances in rates on lake coal and set forth with analytical precision the cost and revenue factors and ratios determinative of the reasonableness of the rates. While the Commission has since more stringently searched the cost and revenue ratios of transportation rates involved in investigations of tremendous scope, the results obtained are less of mathematical potency than the facts established in the Norfolk & Western case. In the latter case, the Commission said:

"We meet in this case the interesting question which for the first time is presented to the Commission—the right of a carrier to increase its rates upon a large volume of traffic solely because such traffic does not bear a certain proportionate share of the return which the carriers make upon their stock. It is to be noted, (1) that there is no claim that the carrier under present rates does not receive full return upon the value of its property, (2) if the proposed rates go into effect and the present volume of traffic to the lakes is maintained the return at present received will

be much increased, (3) the carrier does not propose to reduce its rates upon any coal or other commodity, and (4) it would appear to follow that whenever a carrier finds that it is carrying traffic which does not yield its proportionate share of fixed charges and dividends as it may always do as long as freight is classified it may increase the rates on such traffic up to the point where all traffic, and this means each particular kind of traffic, yields the same net return above cost of its movement to the carrier.

"This contention, however, the president of the Norfolk & Western disavows. Being asked, 'Do you think that if the average cost of doing all the business on a railroad is taken into consideration, and it is shown that any class of business like the coal business is paying something less than that average cost or only slightly more, it would follow that those rates are too low?' he replied, 'I think this, that when the individual commodity and rate are taken, and it is demonstrated that over a certain section of the line on which that particular commodity is transported under identically the same conditions, the same plant is employed, with a condition that prevails as it does in this particular instance absolutely alike for a large percentage of the tonnage handled over a particular part of the railroad, as we are undertaking to show here, I believe that the principle that I have enunciated is a correct one and that the business of this company can be done in that way without injury to any of the interests. I do not mean to carry out this principle on every kind of traffic over every line of road, but I am trying to show that here is a case where it can be done, and it is the only equitable basis on which this rate ought to be made.' Counsel for the Norfolk & Western, in their brief, comment upon his statement as follows: 'Thus Mr. Johnson is not contending that over an entire railroad system on the numerous and varied classes of traffic and commodities the basis which he has mentioned should apply. On this particular division, however, he compares lake-coal traffic

with similar traffic and finds that what his company receives from the lake rates is very much less than on any other classes of its coal traffic or on any other similar commodities. Again, Mr. Johnson states that he does not contend as an abstract proposition, applied to an entire system, that no class of traffic can under any circumstances be carried for less than its full share of the cost of operating and maintaining the railroad, but he does contend that where a comparison is made of lake coal with the other coal traffic, and it is discovered that the lake coal returns a very much smaller revenue than the other coal traffic, this is a material matter and one which justifies an advance in the lake rates.' * * *

"According to the figures furnished by the Norfolk & Western, the cost of carrying all freight over the Bluefield-Columbus line is 2.28 mills per ton per mile. This is lower than the average cost of carrying **all freight** over the balance of the system, for this is stated by the carrier to be 2.95 mills. We have then as cost these two figures, 2.28 mills for the Bluefield-Columbus coal, including lake coal, and 2.95 mills for all other coal, assuming that the cost of carrying coal on all other portions of the line equals the cost of carrying all freight on all other portions of the line, which is the assumption that the carrier has proceeded upon as to the Bluefield-Columbus line.

"We now pass to all coal excepting the coal carried over the Bluefield-Columbus line. This yields a revenue of 3.51 mills per ton-mile, and costs, we have assumed, to transport it 2.95 mills. Therefore all coal (coal carried short distances or into exclusive non-competitive territory or in single carloads and switched to industries, as well as the transshipped by ocean) costs 84 per cent of its revenue, while lake-cargo coal costs 82.6 per cent of its revenue. Thus the Norfolk & Western receives as a profit, over and above costs, 17.4 per cent on lake-cargo coal, Bluefield to Columbus, while on all coal over the balance of the system it receives only 16 per cent above cost.

"The carrier shows also that the earnings per ton-mile on coal from the Pocahontas field eastward to the Atlantic seaboard for shipment beyond the port for 1910 was 3.187 mills. It also shows that the cost per ton-mile of all freight on the line from Bluefield to Norfolk over which this coal moves was 2.136 mills, thus showing that the ratio of this cost to the revenue is 67.02 per cent as compared with 82.6 per cent on the lake-cargo coal. However, it must be borne in mind that the cost, Bluefield to Norfolk, of 2.136 does not include any of the extraordinary cost of concentrating the coal which passes over this division. That entire cost of concentration is borne in the Pocahontas division on the Bluefield-Columbus line, the entire expense thereof thus being made a charge upon the coal between Bluefield and Columbus. To make a fair comparison of cost revenue on coal destined to Norfolk, on the one hand, and that destined to Sandusky on the other, it becomes necessary to add to the cost of all freight, Bluefield to Norfolk (2.136 mills), a proper charge for concentrating coal, which is estimated from figures furnished by the carrier to be .414, approximately four-tenths of a mill per ton per mile, thus making the total cost of the coal, Bluefield to Norfolk, 2.55 mills, which is 80.01 per cent of the revenue of 3.187 mills, approximately the same ratio of cost to revenue as on the lake-cargo coal (82.6).

"Another way of comparing the ratio of all freight cost to revenue of the coal destined beyond the capes from Bluefield to Norfolk with the coal destined beyond Sandusky, between Bluefield and Columbus, is to contrast the cost of all freight, Bluefield to Norfolk (2.136 mills) with the main-line cost of all freight from Bluefield to Columbus (1.939 mills). Between Bluefield and Norfolk this main-line cost is 67.02 per cent of the 'beyond-the-capes' revenue of 3.187 mills, while the main-line cost, Bluefield to Columbus, is 70 per cent of the lake-cargo revenue of 2.76 mills.

"By way of illustrating the revenue received by this carrier from the transportation of coal with that re-

ceived from the transportation of other commodities, the Commission asked the Norfolk & Western to furnish it with the earnings received from a train of 35 cars of through merchandise from Norfolk to Columbus and another from Norfolk to Bristol.

"From these figures it would appear that for the haul from Norfolk to Columbus, 707 miles, the Norfolk & Western receives less per car-mile for transporting sugar, ammunition, canned goods, or even dry goods than it does for transporting coal over the Bluefield-Columbus line, 330 miles. While the average earnings per car-mile from Norfolk to Bristol, 408 miles, on a train of 35 cars, consisting of 5 cars of sugar, 1 of potatoes, 1 of hides, 1 of ammunition, and the remainder of general merchandise, were 7.92 cents, the average revenue on lake coal, Bluefield to Columbus, 330 miles, was 10.58 cents. The earnings averaged per train-mile on the train of merchandise \$2.77, and on the train of 35 cars of coal \$3.02. The 35-car train from Norfolk to Columbus, 707 miles, of general merchandise yielded earnings of \$1,237.70, while the same number of cars of lake coal from Bluefield to Columbus, 330 miles, yielded \$1,222.76. The train of 35 cars of merchandise from Norfolk to Bristol, 408 miles, brought earnings of \$1,132.16, while the same number of cars of lake-cargo coal from Bluefield to Columbus, 330 miles, earn \$1,222.76. Thus we discover that, while the rate per ton per mile on the carriage of lake-cargo coal appears extremely low, the real earnings of the car or the train compare most favorably with the earnings upon the highest class of freight which the railroad carries.

"There could be no better illustration than this of the fallacy of placing reliance upon ton-mile earnings as a basis of rate-making. As the Commission has heretofore found in many cases a much fairer basis is that found in the earnings per car-mile and per train-mile. Much of the profitable freight carried by the railroads of the United States, and perhaps this might be made broader and it could be truthfully said that

most of the freight which pays the carriers the best is that which yields the lowest rate per ton-mile. This arises out of many facts which the traffic manager takes into consideration, the volume of the traffic, the heavy load per car, and the regularity of movement. Some of the roads here concerned are among the most prosperous in the country, and yet their rate per ton-mile is lower than that of many which enjoy no such prosperity."

Re Transportation of Coal 22 I. C. C. Rep. 604, 617.

Compare:

Cattle Raisers' Assn. vs. Missouri F. & T. Ry. Co., 11 I. C. C. Rep. 296, where the Commission discussed the following elements bearing on the reasonableness of specific rates, but with purely relative results: **Terminal cost** at points of origin and destination, **cost and maintenance of equipment**, **cost of loading, unloading, and reloading**, such as watering, feeding, and resting stock in transit, **character of the movement**, number of cars in train, average load per car, volume and desirability of the traffic, return of empty cars, liability of the traffic to damage, cost of carriage, increased cost of producing live stock, decreased selling price, method of making the advanced rates, disappearance of competition, cost of railroad labor and supplies, improved methods of railway operation, increase in traffic mileage revenue per ton per car and per train, and other conditions and circumstances bearing on the cost of transportation.

The problem of estimating the cost of transporting specific commodities is at best in a developmental stage. The most important step in the direction of measuring the reasonableness of a rate in and of itself is the physical valuation of the railroad properties now being prosecuted by the Commission, the result of which, however, will be realized sometime in the future. It is generally believed that this colossal task will not be completed for some years.

It is obvious that the carriers in the past have not conducted their rate making parallel with studies and analyses of comparative transportation costs. That the trend of

regulation, however, is firmly set toward the determination of the reasonableness of rates *per se* is clearly apparent from a close study of the more recent rate investigations conducted by the Commission.

Eastern Live Stock Case, 36 I. C. C. Rep. 675, 689, 690, 693.
Rates for Transportation of Anthracite Coal, 35 I. C. C. Rep.
220, 261, 263, 264, 265, 347, 348, 352, 362, 363.
Western Rate Advance Case, 35 I. C. C. Rep. 497, 450, 561, 569.
Car Spotting Charges, 34 I. C. C. Rep. 609.
Five Per Cent Case, 31 I. C. C. Rep. 351.

Much valuable accounting data and information is now available to the Commission in proceedings involving reasonableness of rates resulting from the system of carriers' accounts promulgated and enforced by the Commission. "Allocated expenses," such as engine service, yard office, salary expense, car detention expense, interest and maintenance charges on facilities, are available for purposes of cost comparisons, while "unallocated expenses," such as general office, traffic and transportation expenses, taxes, and other general expenses, may now be made of relative value in the distribution of the cost burden in rate-making.

Rates for Transportation of Anthracite Coal, 35 I. C. C. Rep.
220, Appendix 352-362.
Saginaw Milling Co. vs. Michigan Central R. R. Co., 33 I. C.
C. Rep. 25, 27.
Separation of Operating Expense, 30 I. C. C. Rep. 676.

§ 6. Relative Reasonableness of Rates.

A transportation rate may be unreasonable, either *per se*, i. e., in and of itself, or relatively, i. e., in comparison with other rates.

In the last preceding section attention has been drawn to the paramount difficulty attendant upon the determination of the reasonableness of a rate *per se*. This difficulty is not encountered in the measuring of rates for their relative reasonableness. The essence of relative reasonable-

ness in a rate is the comparison of such rate with a rate of known reasonableness. The term "known reasonableness" is perhaps ill-advisedly used. It might be the more accurate to say that the comparison should be made with a presumptively normally reasonable rate, for it is obvious that any comparison would achieve no more than a presumptive relativity of the elements of reasonableness. The nearer identical the elements and conditions of traffic in such comparisons the more accurate, of course, will be the result. Relative unreasonableness of a rate may arise from any one of a number of causes. It may proceed from the classification or the relation between commodity and class ratings or by reason of discrimination between particular kinds of traffic or between localities or individuals.

Since it is apparent that so much difficulty attends the determination of the reasonableness of a rate *per se*, it follows that the Commission has invariably measured the reasonableness of rates relatively. The freight rates of this country, both upon different commodities and between different localities, are largely interdependent, and it is the fact that such rates do not bear a proper relation to one another rather than the fact that they are too high or too low, that most often gives cause for complaint. Early in its experience the Commission became cognizant of the fact that the rate structures of the country were not machinations of the moment. The rates themselves and their relativity are the result of a process of slow evolution. Industrial, commercial, and transportation conditions have proceeded from the very inception of the commercial railway in a state of interdependence. Their development has been the occasion for the formulating and maintaining of vast structures of related transportation rates. The process has gone on until the point has been

reached where there seldom exists a specific rate which may stand except for the existence of other rates. Our entire national transportation rate structure is interwoven with local interregional and national rate structures solely interdependent one upon the other.

The Commission has held that in the determination of the proper freight rate which must of necessity be charged by competing lines of railway, it must give consideration to this interdependence of rates and may not look exclusively to that line which can handle the traffic the cheapest or which is the strongest financially. It must give consideration as well to the weaker rival. In this the Commission again encounters an equitable restraint because it may not fix the rate solely with reference to the weakest line, and it would be unjust to the public in the establishment of such a rate to consider merely the most expensive and circuitous route.

Commercial Club, etc., vs. Santa Fe Ry. Co., 19 I. C. C. Rep. 218, 222.

See also:

11 I. C. C. Rep. 238.

If the rates on a particular commodity bear a uniform relation to the rates of a certain class, the inequalities in those rates as between different places are those peculiar to that class, and the Commission has therefore held that a finding that rates on such a commodity, made to conform to a class, are relatively unjust, would inferentially condemn the adjustment with respect to the entire class. It is clear, therefore, that the interdependence of rates is a factor of the utmost importance in determining the reasonableness of rates.

Acme Cement Plaster Co. vs. L. S. & M. S. Ry. Co., 17 I. C. C. Rep. 30, 35.

§ 7. Courts on the Reasonableness of Rates.

As previously stated, it is not within the power of the courts to fix interstate transportation rates since such an authority is purely a legislative one. But like all other legislative action, the legislating of a rate, whether performed by the legislature itself or through an administrative body created by it, must be passed upon judicially when presented to the courts.

The courts in their review of cases involving the reasonableness of rates have distinguished such cases into two classes—first, those cases where the legislative authority has been exercised and the rate fixed and in which the carrier seeking relief from the confiscatory effect of such legislatively established rate must assume the burden of proving that the state authority has fixed an unreasonable and confiscatory limitation upon the carrier's rates, and, second, those cases arising under the Act to Regulate Commerce upon complaint of an aggrieved shipper, and in which the burden is placed upon the complaining shipper to show that the carrier has exercised an unreasonable standard in the charges which it imposes and collects.

In their judicial construction of transportation and rate legislation, the courts have not been uniform in their administration of legal principles. Indeed, at the present time, dire confusion exists between the decisions rendered by the state courts and the rulings of the federal judiciary. It may be truthfully said, however, that the supremacy of the federal judicial authority is gradually molding a new constructive legal code in the application of transportation regulatory laws under which the state courts are gradually giving harmonizing effect to their holdings. The desired effect of uniform judicial construction of the regulatory laws, however, has not been realized, although great

progress has been achieved in clarifying the legal situation.

The scope of this volume does not admit of a prolonged analysis of past judicial reviews of transportation regulation and, therefore, the references here made to decisions of the courts bearing upon the subject are illustrative rather than exhaustive.

Not alone have the courts frequently applied the constitutional test to the regulatory acts, but have had presented to them, and passed upon, important economic phases of rate regulation. In the case of *Smythe vs. Ames*, 169 U. S. 466, the Supreme Court, in 1898, speaking of the basis of calculations to be used in determining the reasonableness of transportation rates, said:

"We hold, however, that the basis of all calculation as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stocks, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth."

In the same case, the court advocated two fundamental elements of reasonableness—the cost of the service to the carrier and the value of the service to the shipper. In many cases before the Commission, the latter principle has been followed so far as it may be said that any distinctive principle of determining the reasonableness of rates has been observed by the Commission. In its first annual report, the Commission declared the cost of service principle to be untenable for the reason that it “would restrict within very narrow limits the commerce in articles whose bulk or weight was large as compared with their value.”

I. C. C. First Annual Report, pages 30 to 32.

The federal courts have also declared the necessity of separating state and interstate traffic, both as to their cost and revenues, that neither may bear the burdens of the other. Thus spoke the court in *Seaboard Air Line R. R. vs. Railroad Commission*, 155 Fed. Rep. 792:

“A state can not justify unreasonably low rates for domestic transportation considered alone upon the ground that the carrier is earning large profits upon interstate business, over which, so far as the rates are concerned, the state has no control, nor can the carrier justify unreasonably high rates on domestic business on the ground that it will be able, in that way, to meet the losses on its interstate business. Domestic and interstate commerce, and the value of the property so devoted, must be kept separate in determining reasonableness of rates for domestic commerce.”

In those states where statutes have been passed reasserting the common law requirement of reasonable transportation rates, thereby superseding the common law, and including in most instances provisions for the publication and submission of tariffs to an administrative body or

commission, it has been the judicial presumption that the standard of reasonableness has been created as of the rate established by publication and submission to the state commissioners and their approval of it for filing. Illustrative cases referred to holding the presumption conclusive as to reasonableness of rates thus established and denial of the right of recovery for damages arising out of the alleged unreasonableness of such charges are of historical interest rather than of practical value at the present time.

See in this connection:

Windsor Coal Co. vs. C. & A. R. R. Co., 52 Fed. Rep. 716.
Young Bros. vs. K. C., etc., R. R. Co., 33 Mo. App. 509.
McGrew vs. Mo. Pac. Ry. Co., 144 Mo. 210.
R. R. Co. vs. People, 77 Ill. 443.
Sorrell vs. R. R. Co., 75 Ga. 509.
Burlington, etc., R. R. Co. vs. Dey, 82 Ia. 312.

In this connection it is important to note that the Interstate Commerce Commission, upon general principles of comity, has always accorded due respect to the action of a state commission in fixing a rate on state traffic, but the national commission has never felt itself bound to accept a state-made rate as a necessary measure of the reasonableness of an interstate rate.

Pulp & Paper Mfrs. Traffic Assn. vs. C. M. & St. P. Ry. Co., 27 I. C. C. Rep. 83, 96.
Highland Park Mfg. Co. vs. S. Ry. Co., 26 I. C. C. Rep. 67, 70.
Waukesha Lime & Stone Co. vs. C. M. & St. P. Ry. Co., 26 I. C. C. Rep. 515, 517.
In re Investigation of Unreasonable Rates on Meats, 23 I. C. C. Rep. 656, 664.
Investigation of Alleged Unreasonable Rates on Meats, 22 I. C. C. Rep. 160, 164.
Willman & Co. vs. St. L. I. M. & S. Ry. Co., 22 I. C. C. Rep. 405.
In re Advances in Rates, etc., 21 I. C. C. Rep. 546, 552.
Baxter & Co. vs. G. S. & F. Ry. Co., 21 I. C. C. Rep. 647, 648.
Cobb vs. N. P. Ry. Co., 20 I. C. C. Rep. 100, 103.
Waco Freight Bureau vs. H. & T. C. R. R. Co., 19 I. C. C. Rep. 22, 26.

- Saunders & Co. vs. Southern Express Co., 18 I. C. C. Rep. 415, 424.
 Commercial Club of Omaha vs. Anderson & Saline River Ry. Co., 18 I. C. C. Rep. 532, 536.
 Bartles Oil Co. vs. C. M. & St. P. Ry. Co., 17 I. C. C. Rep. 146, 148.
 R. R. Comm., etc., vs. C. & N. W. Ry. Co., 16 I. C. C. Rep. 85, 89, 91.
 Fort Dodge Commercial Club vs. I. C. R. R. Co., 16 I. C. C. Rep. 572, 579.
 Paola Refining Co. vs. M. K. & T. Ry. Co., 15 I. C. C. Rep. 29, 31, 32.
 Board of Mayor and Aldermen vs. V. & S. W. Ry. Co., 15 I. C. C. Rep. 453, 459.
 Marble Falls Insulator Pin Co. vs. H. & T. C. R. R. Co., 15 I. C. C. Rep. 167, 169.

In the first **Minnesota Rate Case**, 186 U. S. 257, 46 L. Ed. 1151, the Supreme Court referred to the economic phase of transportation rate-making in a case where state established rates were under attack as to their reasonableness and discriminatory effect, in the following language:

“Each case must be determined by its own considerations, and while railroads are entitled to a fair return upon the capital invested, they are not justified in charging exorbitant rates even in order to pay operating expenses if the conditions of the country did not permit it. It sometimes happens that, for the purposes of ultimate profit and for building up a future trade, railways carry both freight and passengers at a positive loss; and while it may not be in the power of the Commission to compel such a tariff, it could not, upon the other hand, be claimed that the railroads could in all cases be allowed to charge grossly exorbitant rates as compared with rates paid upon other roads, in order to pay dividends to stockholders.”

Prior to its decision in the first **Minnesota Rate Case**, *supra*, the Supreme Court had said on this subject:

“It is the real value of the property which should be taken into consideration. What the company is

entitled to demand in order that it may have just compensation, is a fair return upon the reasonable value of the property at the time it is being used for the public. The property may have cost more than it ought to have cost, and its outstanding bonds for money borrowed and which went into the plant may be in excess of the real value of the property."

San Diego Land & Town Co. vs. National City, 174 U. S. 739, 43 L. Ed. 1154.

In the **Maximum Rate Case**, 167 U. S. 479, it was held that a rate may be unreasonably low or it may be unreasonably high, and thus the interests of the stockholders are most concerned in the former instance, while those of the shipper are paramount in the latter case. Both the interest of the public and of the owner of the property involved should be taken into consideration in the determination of the reasonableness of a rate. In this same case the court significantly added that it was not the unqualified right of a public utility to earn a given per cent on its capital irrespective of the interests of the public, and that the rights of the public should not be ignored in considering the rights and interests of the stockholders of the corporation.

The courts also considered the relation of the rate to the investments of the earnings of the railroad in betterment of and additions to its property. It is obvious to what an unwarranted extent this principle might be carried unless the rights of the public were fully and fairly considered as well as the necessities of the carrier. A just rule, said the court in the *Illinois Central R. R. Case*, is that "expenditures for additions to construction and equipment, as well as expenditures for original construction and equipment, should be reimbursed by all of the traffic they accommodate during the period of their duration, and im-

provements that will last many years, should not be charged against the revenue of a single year."

Maximum Rate Case, 167 U. S. 479, 42 L. Ed. 251.

Nebraska Rate Case, 212 U. S. 12, 53 L. Ed. 371.

Illinois Cent. R. R. Co. vs. I. C. C., 206 U. S. 441, 51 L. Ed. 1128.

Metropolitan Trust Co. (Texas) vs. R. R. Co., 90 Fed. Rep. 683.

See also:

Cotting vs. Godard, 183 U. S. 79, L. Ed. 92.

The conclusions to be drawn from the decisions of the courts thus far referred to is that the courts had prior to the enlargement of the Commission's powers in 1906 arrived at two controlling bases for the determination of reasonableness in transportation rates—the cost of the service to the carrier and the value of the service to the shipper. The importance of these general judicial criteria, however, loses weight under the present authority vested in the Interstate Commerce Commission to entertain original jurisdiction of and pass finally upon all question of facts involved in determining the reasonableness of transportation rates. This power of fixing rates has been possessed by the Commission since the passage of the Hepburn amendment in 1906, and its action in determining the reasonableness of rates is now subject to the review of the courts only upon the legal questions involved. In fact, it is the usual practice of the Supreme Court, in those cases where it has differed from the Commission in its construction of the law, to remand the cases for reinvestigation of the propriety of the rates involved based upon proper construction of the Act to Regulate Commerce.

In the **Clyde Steamship Co. Case**, the Supreme Court adopted such a procedure, saying:

"In the **East Tennessee, Virginia & Georgia Case**, just decided, following the ruling made in **Louisville & Nashville Railroad Co. v. Behlmer**, 175 U. S. 648, 667, and previous cases, we have held that, where the Commission by reason of its erroneous construction of the statute had in a case presented to it declined to adequately find the facts, it was the duty of the courts, on application being made to them, to enforce the erroneous order of the Commission, not to proceed to an original investigation of the facts which should have been passed upon by the Commission, but to correct the error of law committed by that body, and after doing so to remand the case to the Commission so as to afford it the opportunity of examining and finding the facts as required by law. The investigation which we have given the questions which arise in these cases and the consideration which we have bestowed on the issues which were involved in the case of the **East Tennessee, Virginia & Georgia Railroad** have served but to impress upon us the necessity of adhering to that rule, in order that the statute may be complied with both in letter and spirit. Acting in accordance with this requirement, whilst affirming the decree below which refused to enforce the order of the Commission, we shall do so without prejudice to the right of the Commission, if it so elects, to make an original investigation of the questions presented in these records."

I. C. C. vs. Clyde Steamship Co., 181 U. S. 29, 45 L. Ed. 729.

In **Simpson vs. Shepard** (Minnesota Rate Case), 230 U. S. 352, 57 L. Ed. 1511, the Supreme Court gave expression to the effect of the interblending of operations in the conduct of interstate and intrastate traffic upon the reasonableness of rates, saying:

"The interblending of operations in the conduct of

interstate and local business by interstate carriers is strongly pressed upon our attention. It is urged that the same right of way, terminals, rails, bridges, and stations are provided for both classes of traffic; that the proportion of each sort of business varies from year to year, and, indeed, from day to day; that no division of the plant, no apportionment of it between interstate and local traffic, can be made today which will hold tomorrow; that terminals, facilities, and connections in one state aid the carrier's entire business and are an element of value with respect to the whole property and the business in other states; that securities are issued against the entire line of the carrier and can not be divided by states; that tariffs should be made with a view to all the traffic of the road and should be fair as between through and short haul business; and that, in substance, no regulation of rates can be just which does not take into consideration the whole field of the carrier's operations, irrespective of state lines. The force of these contentions is emphasized in these cases, and in others of like nature, by the extreme difficulty and intricacy of the calculations which must be made in the effort to establish a segregation of intrastate business for the purpose of determining the return to which the carrier is properly entitled therefrom."

Norfolk & Western R. R. Co., vs. West Va., 236 U. S. 605.

No. Pac. R. R. Co. vs. North Dakota, 236 U. S. 585.

Knott vs. C. B. & Q. R. R. Co., 230 U. S. 474, 57 L. Ed. 1571.

The capitalization of a carrier as an element determinative of reasonableness of rates is becoming a more frequent factor in rate issues presented to the Commission, and it is important to note what the Supreme Court has said regarding the honest value of capitalization and a bona fide return thereupon:

"The cost of reproduction is not always a fair

measure of the present value of a plant which has been in use for many years. The items composing the plant depreciate in value from year to year in a varying degree. Some pieces of property, like real estate for instance, depreciate not at all, and sometimes, on the other hand, appreciate in value. * * * Counsel for the company urge rather faintly that the capitalization of the company ought to have some influence in the case in determining the valuation of the property. It is a sufficient answer to this contention that the capitalization is shown to be considerably in excess of any valuation testified to by any witness, or which can be arrived at by any process of reasoning. The cause for the large variation between the real value of the property and the capitalization in bonds and preferred and common stock is apparent from the testimony. All, or substantially all, the preferred and common stock was issued to contractors for the construction of the plant, and the nominal amount of the stock issued was greatly in excess of the true value of the property furnished by the contracts. * * * It perhaps is unnecessary to say that such contracts were made by the company with persons who, at the time, by stock ownership, controlled its action. Bonds and preferred and common stock issued under such conditions afford neither measure of nor guide to the value of the property."

Knoxville vs. Knoxville Water Co., 212 U. S. 1, 53 L. Ed. 371.

As to the extent to which judicial review may now be had of the action of the Interstate Commerce Commission in determining the reasonableness of rates, the language of the Supreme Court in the Louisville & Nashville Case is significant. There the court said:

"But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. A find-

ing without evidence is arbitrary and baseless. * * * In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi-judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence.' "

I. C. C. vs. L. & N. R. R. Co., 227 U. S. 88, 57 L. Ed. 431.
I. C. R. R. Co. vs. I. C. C., 206 U. S. 441, 51 L. Ed. 1128.

In summary, it is clear that the Interstate Commerce Commission has original jurisdiction and final determination of the propriety of interstate rates based upon a proper construction of the Act to Regulate Commerce, but that the courts will not permit the Commission to regulate and control the policy of railroads in fixing rates or to force them to substitute a lower rate for one that is just and reasonable. So, if a new rate is reasonable, the carriers may not desist from its enforcement because the former rate had long been in use and important business interests developed thereby.

Southern Pac. Co. vs. I. C. C., 219 U. S. 433, 55 L. Ed. 283.

See also:

Wilcox vs. Consolidated Gas Co., 212 U. S. 19, 53 L. Ed. 382.
Prentiss vs. Atlantic Coast Line R. R., 211 U. S. 210, 53 L. Ed. 150.
Cotting vs. Godard, 183 U. S. 79, 46 L. Ed. 92.

The technical judicial view was aptly illustrated in the **Arlington Heights Case**, where the Commerce Court held that the Commission was without power to effect through the reduction of alleged unreasonable rates the protection of the California lemon industry as against foreign competition. This decision of the Commerce Court turned upon a technicality in the grounds upon which the Com-

mission based its ruling. While the facts before the Commission were sufficient to have warranted a finding that the rates were unreasonable *per se*, the Commission based its order on the ground of discrimination against the domestic in favor of the foreign lemon industry. Had the holding of the Commission been that the rates were unreasonable *per se* the order would have undoubtedly been sustained by the Commerce Court. A subsequent decision in the same case by the Commission declared the rates unreasonable *per se* and such order went into effect as a reduction in the rates.

See also:

Texas & Pacific Ry. Co. vs. Abilene Cotton Oil Co., 204 U. S. 426, 51 L. Ed. 553, holding that the courts are without power to grant redress to shippers until the Commission has declared a rate to be unreasonable.

§ 8. The "Minimum Rate" Bogey.

Theoretically the "minimum rate" has been proclaimed as the correct economic measure of reasonableness in rates, but the evil of the theory is worse than the ill it seeks to cure. The theory itself is a disavowal of every equitable principle in rate-making and would simply amount to measuring the reasonableness of a rate *per se* by the rigid proportionment of revenue to weight of freight, weight of car under load, and weight of car in return movement. The minimum rate test is but a subterfuge for the construction of rates embodying the cost of service principle with a misnomer to disguise its viciousness. It is only in an infinitely small number of cases that a minimum rate might represent a reasonable rate, whereas, on the other hand, the proportionment of rates resulting from the establishment of minimum rates could be manipulated with vicious and irregular effect.

That the authorities are not agreed upon the constitutionality of the power to fix minimum rates if such authority were delegated by Congress, is apparent from the following quotation from Mr. Ripley's "Railroads, Rates, and Regulations:"

"May power to fix minimum rates, so necessary to an adequate program of control, be constitutionally delegated by Congress? The question has never been squarely presented to the Supreme Court. But the language in many cases has been such as to indicate that maximum rates alone may be lawfully established. Is the reiteration of the word "maximum" intentional? Or may it be that the judicial mind has never yet contemplated the need of regulating the minimum rate? Surely it seems an anomaly that the government should ever seek to fix such a lower limit, below which compensation may not be had. And yet many cases show that it is absolutely necessary, to the end that justice may be done. Or may the unconstitutionality of fixing minimum rates depend upon the fact that, if thus prescribed along with maximum rates, it will amount, practically, to determination of the absolute rate—the bogey which the carriers seem most of all to hold in dread? Interesting and inviting possibilities of judicial interpretation are indeed suggested along this line, were there opportunity to pursue them further."

City of Spokane vs. N. P. Ry. Co., 21 I. C. C. Rep. 400, 415.
I. C. C. Ann. Rep. 1911, page 34.

Commissioner Harlan, in his dissenting opinion in the Shreveport Case, gave paramount effect to minimum over maximum rates as against state authority in the following language:

"The power of the federal government to fix maximum rates on state traffic, even when conducted by an interstate carrier, is therefore a matter of no small

doubt. Its power to fix minimum rates on state traffic conducted by an interstate carrier, on the general theory that such traffic ought to contribute ratably to the cost of operating a vehicle of interstate commerce in order not to become a burden upon such commerce, seems to me to be more clear. On the same general theory I think that the Congress in aid, or rather in protection, of interstate commerce may forbid discriminations by a railroad or other instrument of interstate traffic in favor of state traffic. This however it has not yet undertaken to do. In my judgment the language of the proviso of section 1 admits of no other reasonable construction than that the Congress intended expressly to withhold from this Commission the right, directly or indirectly, to exercise its powers with respect to state commerce or to enforce upon such traffic any of the provisions of the act."

R. R. Comm. of La. vs. St. L. S. W. Ry. Co., 23 I. C. C. Rep. 31, 54.

§ 9. Interblending of State and Interstate Rates.

The question of the extent to which the national government may exercise control over state rates in their effect upon interstate rates has assumed important proportions within the last few years. The matter of centralized federal control over both interstate and intrastate traffic is now being agitated and strongly urged by many railroad and business interests, presumably in the interest of greater uniformity and regulation efficiency. It is not deemed advisable within the scope of this volume to do more than direct attention to two recent utterances on the subject by the Supreme Court:

"If the situation has become such by reason of the interblending of the interstate and intrastate operations of interstate carriers, that adequate regulation of their interstate rates can not be maintained with-

out imposing requirements with respect to their intrastate rates which substantially affect the former, it is for Congress to determine, within the limits of its constitutional authority over interstate commerce and its instruments the measure of the regulation it should supply. It is the function of this court to interpret and apply the law already enacted, but not under the guise of construction to provide a more comprehensive scheme of regulation than Congress has decided upon."

Simpson vs. Shepard, 230 U. S. 352, 57 L. Ed. 1511.

In the **Shreveport Case** the same court laid down the rule even more specifically, thus:

"The fact that carriers are instruments of intrastate commerce, as well as of interstate commerce, does not derogate from the complete and paramount authority of Congress over the latter or preclude the Federal power from being exerted to prevent the intrastate operations of such carriers from being made a means of injury to that which has been confided to federal care. Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the state, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the state, and not the nation, would be supreme within the national field. * * * This is not to say that Congress possesses the authority to regulate the internal commerce of a state, as such, but that it does possess the power to foster and protect interstate commerce, and to take all measures necessary or appropriate to that end, although intrastate transactions of interstate carriers may thereby be controlled. * * * That an unjust discrimination in the rates of a common carrier, by which one person or locality is unduly favored as against another under substantially similar conditions of traffic, constitutes

an evil is undeniable; and where this evil consists in the action of an interstate carrier in unreasonably discriminating against interstate traffic over its line the authority of Congress to prevent it is equally clear. It is immaterial, so far as the protecting power of Congress is concerned, that the discrimination arises from intrastate rates as compared with interstate rates. The use of the instrument of interstate commerce in a discriminatory manner so as to inflict injury upon that commerce, or some part thereof, furnishes abundant ground for federal intervention. Nor can the attempted exercise of state authority alter the matter, where Congress has acted, for a state may not authorize the carrier to do that which Congress is entitled to forbid and has forbidden."

Houston, E. & W. T. R. R. Co. vs. United States, 234 U. S. 342, 58 L. Ed. 1341.

§ 10. Presumption of Reasonableness of Rates.

The legal presumption is that a rate fixed by the legislative authority is reasonable and the burden of proof rests upon the party seeking to challenge the validity of the Act of the legislature. In other words, if the carrier seeks to demonstrate that the rate established by the legislative action is an infringement of the constitutional guarantee of protection of property, it must assume the burden of proving a clear case in its favor or the legislation must be upheld.

C. M. & St. P. Ry. Co. vs. Tompkins, 176 U. S. 167, 44 L. Ed. 417.

See also:

M. & St. L. R. R. Co. vs. Minnesota, 186 U. S. 257, 46 L. Ed. 1151, holding that "the presumption is that the rates fixed by the Commission are reasonable and the burden of proof is upon the railroad company to show the contrary."

The mere existence of a rate presumes its reasonable-

ness, but it is not a presumption that a new or higher rate would be unreasonable.

I. C. C. vs. Union Pac. R. R. Co., 222 U. S. 541, 56 L. Ed. 308.
So. Pac. Co. vs. I. C. C., 219 U. S. 433, 55 L. Ed. 283.

§ 11. Powers of Interstate Commerce Commission Not Contravened by Shipping Act.

The recent Act to Regulate Vessels in Domestic Commerce, enacted September 7, 1916, does not affect the power or jurisdiction of the Interstate Commerce Commission, nor does it confer upon the shipping board concurrent power or jurisdiction over any matter within the power or jurisdiction of such Commission; nor is the shipping Act to be construed to apply to intrastate commerce.

Regulation of Vessels in Domestic Commerce, Act Sept. 7, 1916, 39 U. S. Stats., chapter 451, section 33.

CHAPTER VIII.

ACT TO REGULATE COMMERCE AS AMENDED (CONTINUED).

Amplification of Sections. (Continued.)

- § 1. Amplification of Section 1 as Amended (Continued)—Reasonableness of Classification.
- § 2. Jurisdiction of Interstate Commerce Commission Over Classification of Property for Transportation.
- § 3. Classification—"The Shipper's Problem."
- § 4. Importance of Classification.
- § 5. Relation of Classification to Freight Rates.
- § 6. The Legal Status of a Freight Classification Schedule.
- § 7. Methods of Developing Classifications.
- § 8. General Principles of Freight Classification.
- § 9. The Interstate Commerce Commission on the General Principles of Classification.
- § 10. The Interstate Commerce Commission on Uniform Classification.

CHAPTER VIII.

ACT TO REGULATE COMMERCE AS AMENDED (CONTINUED).

Amplification of Sections. (Continued.)

§ 1. Amplification of Section 1 as Amended (Continued)— Reasonableness of Classification.

Section 1 of the Act to Regulate Commerce makes it the duty of all common carriers subject to the Act "to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this Act which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this Act upon just and reasonable terms, and every such unjust and unreasonable classification, regulation, and practice with reference to commerce between the states and with foreign countries is prohibited and declared to be unlawful."

In the fifteenth section of the Act the Commission is empowered to "establish through routes and joint classifications, and may establish joint rates as the maximum to be charged and may prescribe the division of such rates as hereinbefore provided and the terms and conditions under which such through routes shall be operated, whenever the carriers themselves shall have refused or neglected to establish voluntarily such through routes or joint classifications or joint rates; and this provision shall apply when one of the connecting carriers is a water line."

The section further provides "that whenever, after full hearing upon a complaint made as provided in section thirteen of this Act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative (either in extension of any pending complaints or without any complaint whatever), the Commission shall be of opinion that * * * any individual or joint classifications * * * of such carrier or carriers subject to the provisions of this Act are unjust or unreasonable or unjustly discriminatory, or unduly preferential or prejudicial or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what * * * individual or joint classification * * * is just, fair, and reasonable to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds the same to exist, * * * and shall adopt the classification * * * so prescribed. * * *

"Whenever there shall be filed with the Commission * * * any new individual or joint classification, * * * the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative with-

out complaint, at once, and if it so orders, without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the propriety of such * * * classification * * * ; and pending such hearing and the decision thereon the Commission upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension may suspend the operation of such schedule and defer the use of such * * * classification, * * * but not for a longer period than one hundred and twenty days beyond the time when such * * * classification * * * would otherwise go into effect; and after full hearing, whether completed before or after the * * * classification * * * goes into effect, the Commission may make such order in reference to such * * * classification * * * as would be proper in a proceeding initiated after the * * * classification * * * had become effective: **Provided**, That if any such hearing can not be concluded within the period of suspension, as above stated, the Interstate Commerce Commission may, in its discretion, extend the time of suspension for a further period not exceeding six months."

§ 2. Jurisdiction of Interstate Commerce Commission Over Classification of Property for Transportation.

The mandate of the statute as now amended is that whatever classification the carriers apply to the property they undertake to transport it must be just and reasonable, and authority is vested in the Commission to suspend and investigate any individual or joint classification or property for transportation which may be filed with it by any carrier or carriers, either upon complaint or upon

its own initiative without complaint. In the event the Commission finds such classification unjust and unreasonable, or unduly discriminatory, or prejudicial, or preferential, or otherwise in violation of any of the provisions of the Act to Regulate Commerce, or of the acts amendatory thereof, it is empowered to determine and prescribe what shall be a just and reasonable individual or joint classification and to enter an order requiring the carriers to observe and enforce such prescribed classification.

Prior to the 1910 amendment of the Act to Regulate Commerce, the Interstate Commerce Commission was not in statutory terms specifically empowered to establish just and reasonable classifications of property for transportation, nor were there any specific provisions in the Act previous to that time relating to the classification of freight. The Commission had required the carriers to file their tariffs and that those tariffs should contain the classification of freight in effect, and where the Commission had considered classification cases it had dealt with classification as a "practice" or "regulation" affecting rates. The Act, as now amended, requires the establishment and observance of just and reasonable classifications of property for transportation, and empowers the Commission to establish fair and reasonable classifications and to require their observance.

C. H. & D. R. R. Co. vs. I. C. C., 206 U. S. 142.

Interior Iowa Cities Case, 28 I. C. C. Rep. 64.

Board of Trade of Chicago vs. C. & A. R. R. Co., 27 I. C. C. Rep. 530, 534.

Re Western Classification No. 51, 25 I. C. C. Rep. 442, 469, 609.

See also:

In re Advances on Coal to Lake Ports, 22 I. C. C. Rep. 604, 624.

Caldwell Co. vs. C. I. & L. Ry. Co., 20 I. C. C. Rep. 412, 415.

McClung & Co. vs. S. Ry. Co., 22 I. C. C. Rep. 582, 584.

National Hay Assn. vs. M. C. R. R. Co., 19 I. C. C. Rep. 34, 38.
Rail & River Coal Co. vs. B. & O. R. R. Co., 14 I. C. C. Rep.
86, 88.

California Commercial Assn. vs. Wells, Fargo & Co., 14 I. C.
C. Rep. 422, 433.

Procter & Gamble vs. C. H. & D. R. R. Co., 9 I. C. C. Rep.
440.

It should be noted in this connection that prior to the amendment of 1910 the Supreme Court had held that the Act to Regulate Commerce gave to the Commission power "to consider the whole subject and the operation of the new classification in the entire territory, as also how far its going into effect would be just and reasonable, would create preferences or engender discriminations; in other words, its conformity to the requirements of the Act to Regulate Commerce."

C. H. & D. R. R. Co. vs. I. C. C., 206 U. S. 142, 51 L. Ed. 995
(1907).

See also:

In re Advances on Coal to Lake Ports, 22 I. C. C. Rep. 604,
624.

McClung & Co. vs. So. Ry. Co., 22 I. C. C. Rep. 582, 584.

Caldwell Co. vs. C. I. & L. Ry. Co., 20 I. C. C. Rep. 412, 415.

National Hay Assn. vs. M. C. R. R. Co., 19 I. C. C. Rep. 34, 38.

In its report In re Western Classification No. 51, 25 I. C. C. Rep. 442, 453, the Commission recited the history of classifications of freight from the year 1887, when the original Act to Regulate Commerce took effect:

"The early development of classification of freight by the railways in the United States was not along any definite lines. Acting independently, carriers originally adopted individual classifications. It has been estimated that there were, at one time, as many as 138 distinct classifications in eastern trunk line territory, varying in the number of classes provided, each classification built up independently of all others to serve the needs of the particular road to which it applied.

"The formation of through routes over connecting lines and the growth of through traffic necessitated the establishment of classifications in addition to those adopted by each separate carrier for its own traffic. To meet this need confederations of railroad companies established classifications for through traffic in various sections of the country, some covering large and some small areas. The following are classifications so formed, all of which were later absorbed by the official classification: The trunk lines westbound classifications, the eastbound classification, the joint merchandise freight classification, the middle and western states classification, the east and southbound classification.

"As a result of this multiplicity of classifications there was great confusion in the traffic situation in this respect. In very many cases two or more classifications were in force on one road; one for local traffic, one for through traffic in one direction, another for that in the opposite direction, and a fourth, perhaps, for traffic coming from or going to a particular section of the country. In 1883 the Wabash Railroad Company had nine different classifications in effect for traffic originating on its line. The existence of so many classifications was a public evil and necessarily resulted in constant embarrassment in the interchange of traffic between the roads. Traffic managers and agents found it difficult to quote rates on through traffic with any degree of accuracy, and the owners of the freights were frequently subjected to the payment of freight charges greatly in excess of what they had anticipated. It was evident that greater uniformity in classification was an urgent need.

"The prohibition of unjust discrimination by the interstate-commerce act of 1887 stimulated the movement for uniformity. It was recognized by railroad officials that they could not observe the law without establishing greater uniformity of classification.

"The first important step in that direction was the establishment of the official classification, which was

put in force in 1887 contemporaneously with the taking effect of the act to regulate commerce. This classification was generally adopted throughout the territory north of the Ohio and Potomac rivers, and east of a line roughly drawn from Chicago to St. Louis and the junction of the Mississippi with the Ohio. There were at this time 131 railway companies within official classification territory, many of which still had a separate local classification. At first the official classification did not entirely displace all others within the territory which it covered. Of the total number of roads using it in 1888, 87 used the official classification exclusively, 35 used one other, and 9 used two others.

"In 1882 the joint western classification, the forerunner of the present western classification, was adopted by certain roads running west from Chicago and became effective in 1883. The roads making use of the western classification steadily increased in number until in June, 1889, there were 69. During the same year the roads that formed the Texas association and also the transcontinental lines used this classification so that, by the end of the year, practically all the railways operating throughout the territory from Chicago and St. Louis to the Pacific coast had adopted it.

"By 1889 the lines south of the Ohio River and east of the Mississippi River had adopted the classification of the Southern Railway & Steamship Association, later designated as the southern classification.

"Since the passage of the interstate commerce law no practical advance has been made toward unification except as the result of the absorption of special and exceptional classifications into those of the three chief classifications of the country.

"At the present time these three great classifications, the official western, and southern, subject to exception sheets and commodity rates of the individual carriers and the limited use of certain state classifications, transcontinental tariffs, and the Canadian classification, are the only classifications applying to

interstate traffic. Occasionally however, these classifications overlap. Articles shipped from a point in one territory to a point in another are sometimes governed by the classification of the point of origin and at other times by that of the place of destination. Confusion arises particularly in the shipment to and from a point located comparatively near a classification boundary. St. Louis, for instance, uses the official classification for eastbound freight, the western for westbound freight, the southern for southbound freight, and the transcontinental tariffs for Pacific coast trade.

"As early as 1887 an attempt was made by traffic officials of lines east and west of Chicago to unify the official and western classifications, but a series of rate wars interfered with the work.

"In 1888 the House of Representatives passed a resolution authorizing and directing the Interstate Commerce Commission within three months, or by January 1, 1889, to prescribe a 'uniform classification' for all the roads in the United States. The resolution was unacted upon by the Senate, representations having been made that if the railroad companies were given further time they would obviate the necessity for congressional action. Prompted by the disposition thus manifested in the popular branch of Congress and urged thereto by pressure constantly brought to bear by this Commission, a convention of traffic officials of transportation companies throughout the country met in Chicago, December 4 and 5, 1888, for the purpose of considering uniformity of classification. At this meeting a standing committee of two members from each of the eight traffic associations represented was selected and was instructed 'to endeavor to combine the existing classifications in one general classification by the use of such number of classes as will prevent conflicting commodity as well as class rates in the several sections of the country, without sacrificing the proper interests of the carriers.' "

"Meetings were held by this committee at various

places from time to time during the years 1889 and 1890; and finally in June, 1890, a classification was agreed upon and recommended for adoption by all the roads on January 1, 1891. The proposed classification contained nominally 11 classes, in addition to which the classification provided one and one-half, double, two and a half, three and four times first class, making the reality 16 classes. The first 5 numbered classes and the multiples of first class applied to less-than-carload lots, while for carload lots the remaining 6 numbered classes were used.

"With the proposed uniform classification the committee submitted a set of rules for the establishment of a permanent organization. These rules provided for a board of uniform classification to consist of representatives from various territories in which the proposed classification would be made effective. This board was to have power by a vote of two-thirds of its members to make necessary changes in or additions to the classification, and its decisions were to be final. The board was to elect a chairman and three district chairmen, one for the district covered by the present official classification, one for that covered by the southern classification, and a third for that covered by the western classification. It being recognized that many changes would have to be made in the classification from time to time, the rules provided that applications for relief were to be made to the district chairman who would summarize the cases, and present them to the board for determination. The district chairmen were to unite in recommendations as to the rate to be given new or analogous articles, but such advice should not prevail unless the chairman approved, authority thus given to be subject to review by the board at its succeeding meetings.

"The following traffic associations were represented on the committee which made this report: The New England Freight Association, Central Freight Association, Western Freight Association, Mississippi Valley Railroads, Trunk Line Association, Southern Railway & Steamship Association, Trans-Missouri

Association, and the Southern Interstate Association. Early in the proceedings the Transcontinental Association had withdrawn its representatives from the committee and had failed to unite in the result reached by the conference.

"The members of the committee emphasized the necessity of showing a broad and liberal spirit. While at no time forgetful of the interests they represented, they endeavored to keep within the horizon the desirability of also regarding matters from a national rather than a sectional standpoint. In their report the desirability of reducing the number of commodity rates in the various territories to a minimum was emphasized. While the right of roads by agreement to make commodity rates was conceded, it was understood that this privilege should be exercised sparingly. The report stated:

The continued operation of the interstate commerce law made plain the necessity for greater uniformity. In deference thereto, and also to meet the demand for through lines, it became essential to facilitate the quotation of through rates between points far removed. This could most readily be done by the issuance of tariffs governed by one classification. If two or more classifications were used, resort must be had to numerous commodity tariffs. Moreover, the disparities encountered proved annoying to shippers and embarrassing to the roads. The public failed to perceive, nor was it always possible to explain, why articles of common use should be classified differently east and west or north and south of certain dividing lines.

* * * * *

The constant increase of traffic interchanged with railroads in the populous states, together with the legal requirements as to the publication of joint tariffs, emphasize the desirability (no less than the necessity) of at least approximating uniformity in freight classification. Without such reform in the territories wherein dissimilar

classifications overlap, it is impracticable to avoid discriminations such as are forbidden. Furthermore, it is impossible in all cases to insure the equalization of through rates via the several gateways between large producing and consuming sections when different rules and classifications prevail upon connecting lines. Confusion and liability ensue and necessarily will continue until the more glaring differences are removed. That relief your committee labored to afford.'

"When January 1, 1891, came, the time fixed for the adoption of the proposed uniform classification was postponed until March 1, 1891, at which time no action was had. With March 3 came the adjournment of Congress, and with its adjournment all further efforts on the part of the carriers toward a uniform classification came to an end.

"In 1906 the Hepburn act was passed giving this Commission increased powers. One clause of this act provided for through rates and routes, which requirements made the necessity of uniform classification still more evident.

"The question of uniform classification continued to be agitated, and in 1907 it was again taken up seriously by the railways. A committee of 15 members, consisting of 5 from each classification territory, was appointed to consider whether uniformity in classification could be accomplished and to suggest a mode of procedure to be followed by a permanent committee to be appointed later. This temporary committee, after three months of continuous investigation, reported that 'while establishment of a uniform classification is impracticable at this time, it can ultimately be worked out along intelligent and satisfactory lines.' The committee concluded that as to rules, descriptions of articles, packing requirements, and minimum carload weights uniformity was possible of attainment; that uniformity in these respects, when accomplished, would represent material improvement in classification conditions; that such uniformity must

in any event be accomplished before uniform classification ratings can be adopted; and that a committee should be created whose exclusive work should be the preparation of the uniform rules, descriptions of articles, packing requirements, and minimum carload weights. An executive committee of 21 executive traffic officers was appointed by the carriers to supervise the work, and that committee selected 9 traffic men, to be known as the 'working committee,' who were to devote their entire time to the work. This committee, known also as the committee on uniform classification, was formally organized and began its labors on September 15, 1908, and has been exclusively engaged in such work since that time.

"The original plan of the committee was to proceed continuously with the revision of rules, descriptions, and minimum weights, until it was ready to propose a complete uniform scheme. After consideration, however, it was determined to suggest to the territorial classification committees, from time to time, such changes as had already been decided to be desirable in the interest of uniformity. After making a careful comparison of the three classifications, the rules were taken under consideration and following the rules the general descriptions, packing requirements, and minimum weights. Many conferences with shippers were held and the members of the committee spent a great deal of time in the field making personal visits to manufacturing plants and districts. The findings of the uniform committee were submitted, from time to time, in printed reports to the several classification committees for consideration. The changes proposed were placed upon the dockets of the several classification committees, and again hearings were held, in which shippers were invited to participate."

§ 3. Classification—"The Shipper's Problem."

It is pertinent at this point to call attention to the general plan under which the traffic library has been devel-

oped in its analytical treatment of the many and varied subjects relating to interstate commerce and transportation. The plan of the complete work is comprehensive of three major divisions: (1) the physical entities and details of transportation; (2) an amplification of the regulatory statutes; and (3) the result of the operation of the regulating laws administratively and judicially applied to the physical details of transportation and shipping.

We have now reached a point in the progress of this plan of treating the great subject of regulated interstate transportation (and also as may pertain to regulated state transportation) where it is not alone pertinent, but vitally important, to bring to the serious attention of the shipping public its part in the transportation and shipping problems of the present day, in the solution of which may often be discovered the means whereby material pecuniary advantage may be properly added to the returns on the shipper's investment. Dismiss from your mind the charge of corrupt and dishonest methods so often and so indiscriminately laid against the railroads, and apply the necessary degree of care, systematization and knowledge to your shipping department that you may control a cost that you have long been arbitrarily adding to your cost of production as an uncontrolled factor in your shop or factory accounting, and the results will appear with surprising gain on the credit side of your ledger.

Railroad honesty and integrity are today at par, but the efforts of the general shipping public to economically and advantageously solve its side of the transportation and shipping problem show deplorable fluctuations below that figure. The time has come when the shipper can no longer shut his eyes to the necessity of analyzing his transportation methods and cost, for the cost of transportation frequently stands as a barrier between his field of produc-

tion and his selling markets. The great reforms that have been wrought in transportation methods, practices, services, and rates, have already brought about and are still bringing about reforms equally as important and essential in the industrial and commercial fields. And that the shipper may have an adequate knowledge wherewith he may be able to dissect and analyze his shipping and transportation problems, and bring about their economic solution, the treatment of the subject is now turned to a practical consideration of the transportation practices and principles which underlie and control the very life-blood of American commerce.

§ 4. The Importance of Classification.

The classification of property for transportation is the foundation of rate-making. It is an artificial arrangement of the articles of commerce into groups or classes, according to transportation and commercial relations, for the purpose of establishing a basis for the equitable distribution of the proportionate part of the carrier's revenue which each class of articles must bear. Such a classification of commodities cannot of necessity be controlled by any of the natural relations or affinities of the articles, but is presumptively based upon principles of transportation and commercial economics. However, the absence of these essential principles is often more prominently noticeable than their presence, in a close analysis of any of the general classification schedules now in effect.

There are approximately twenty-five thousand articles or commodities employed in the commerce of this country and with foreign countries. These articles move about from one point to another in the general fluidity of commerce. They comprise the structure upon which the bur-

den of the expense of their movement must be distributed, and the economic law, ideally at least, requires that this distribution shall be sufficiently equitable not to retard or impede their freest possible movement in the intercourse of commerce. These thousands of articles present infinite variation in kind, use, and value.

If a system of rate-making upon each individual article was in vogue, without any arrangement into classes or groups, the distance of the haul and the weight of the article would unquestionably be the controlling factors in determining the transportation charges of rates, except where competition might render modification of such system necessary. Such a system of rate-making, however, would be so cumbersome, inflexible, and inconvenient, as to defeat the ends of equity and justice. It would be imperative that a flexible, equitable, and convenient classification be effected; one in which by group adjustment, in which transportation and commercial relationship of articles prevail, recognition is given to the great variety of kind, density, value, use, circumstances, and conditions which are attendant upon the transportation of property.

While it may be claimed for the method which fixes a rate on each article that greater uniformity may be preserved in the distribution of the rates, the fact remains that such a system of rate-making would deprive a majority of the articles of commerce of their movement to distant points and confine commercial competition to small and restricted areas.

Experience has demonstrated the necessity of an equitable classification of property for transportation purposes, not alone for the convenience of the carriers in the distribution of their rates, but also for the accommodation of the shippers in their commercial latitude which it affords them in the movement of their goods.

The method of classification generally in vogue on American railways now, and for many years past, consists in a system of grouping a large number of transportationally related articles into a small number of classes and charging a different rate for each class. Modifications are made by way of differential adjustments between these general classes, as, for instance, a multiple application of a certain class rating, or a fixed percentage above or below a certain standard class rating.

Pyle vs. E. T., etc., R. R. Co., 1 I. C. C. Rep. 473, 1 I. C. Rep. 770 (1888).

This method of classification is recognized by the Act to Regulate Commerce as an essential part of rate-making, and the general requirement of the Act that the carriers subject thereto shall keep their schedules of rates open to public inspection includes the provision that such schedules "shall contain the classification in force." The Interstate Commerce Commission, from its very inception, has recognized the necessity and convenience of a classification of freights, and in one of its earliest cases spoke as follows with respect to the classification system then in effect:

"This mode of making rates by classification is intended to be for the convenience of the railroad companies and also for the accommodation of the shippers, and long experience has shown that it is the best and most practical way yet devised for dealing with the subject. To demonstrate that there are occasional inequalities of rates upon some of the articles thus grouped together in one class as compared with others in that class is not to prove that the whole system is wrong, but simply that there is or may be some slight or occasional difference in the rate charged upon some one article in proportion to its value,

bulk, or weight, when compared with another, that inflicts no substantial wrong upon any one, and is one of the mere incidents of the service by this method of transportation. When comparison is attempted to be made of the respective classifications and rates, the different conditions of transportation can not be ignored."

§ 5. Relation of Classification to Freight Rates.

Classification is the foundation of rate-making; it is the basis—the foundation and first principle—of the construction of all transportation rates or charges. It has no significance alone, and the rate is useless without its classification. To speak accurately, the tariff of rates and the classification schedule are interdependent, and the function of either is utterly destroyed without the use of the other. The function of the classification schedule is to adjust or arrange into groups or classes all possible forms of property subject to transportation, and the function of the tariff of rates is to fix the rate which shall be charged upon each one of such groups or classes. A classification schedule contains no rates; it simply provides ratings which determine the application of the rates in the tariff of rates.

Fundamentally tariffs of rates are divided into two distinct classes—the class-rate tariffs and the commodity-rate tariffs. The class rates are arranged to apply to the several classes embraced in the classification, while the commodity rates operate as exceptions to the generally established class or group basis of certain articles necessitated by an unusually heavy tonnage and commercial and transportation conditions which require different rules and usually a lower transportation charge than are afforded by the classification. Thus, an article of this kind is removed

from the operation of the rules and rating of the classification and given a specific rate under certain conditions of shipment, or form, or quantity, between certain points, where, were the rules and rating of the classification adhered to, it might not be able to move in large quantities. The classification adjustment still remains generally effective in the territory which it governs, but in the particular section where the commodity rate is applied, the article affected is removed for that purpose from the rating contained in the general classification. An article may be removed from the rating of the classification and the conditions governing such rating in two ways—first, by exception to the classification modifying the rating, and, second, by removing the article from the classification rating and applying a specific commodity rate. While the establishment of commodity rates is almost invariably for the purpose of affording the affected commodity a lower rate, it is not necessarily true that this must always be the case. There are instances where an article is removed from the classification rating and rules and a higher rate applied because of circumstances and conditions affecting its transportation which render the assessment of a higher rate essential and proper. This, however, is of rare occurrence.

Generally the articles or commodities which are afforded specific commodity rates are those of a coarse and cheap nature and of large consumption in trade, such as coal, stone, gravel, ore, grain, live stock, brick, oil, cement, sand, salt, etc. In some classifications these commodities are given no rating, but are left to the individual carriers operating under the classification to apply such specific commodity rates as transportation and commercial conditions on their lines require.

In the Western Classification Case, the Commission

referred to the relation of the classification to the rates based upon it, in the following language:

“Classification is an art or a science in itself. Having completed a new classification along these or similar lines, each carrier can readjust its rates on the basis of that classification in such a manner as to preserve its existing revenues. This assumes what in our judgment, is the correct method of procedure, that the uniform classification must be worked out without an attempt to affect revenues. Classification and rates and revenues should be kept entirely separate. There will doubtless be many coincidences in which the present rate applied to the new classification will bring about the exact transportation charge which results from the old rate applied to the old classification. In other cases the rate must be advanced or reduced, depending upon the change in the classification of the article in order to protect existing revenues. This is entirely without reference to the sufficiency or insufficiency of present revenues, which is a distinct and very different question. It would only complicate and confuse matters to attempt, through the instrumentality of the classification, to bring about a revision in rates and charges. Whether a rate is too high or too low should be made a separate issue distinct from classification. Nevertheless, as far as possible, the establishment of ratings and the publication of rates should follow changes in the classification very closely. A classification is a universal tariff from which the schedules of individual carriers should not depart except in cases demanded by special conditions. Commodity tariffs in restricted numbers will probably always remain a necessity.”

In re Western Classification No. 51, 25 I. C. C. Rep. 442, 453.

§ 6. The Legal Status of a Freight Classification Schedule.

A schedule of classification of freights bears the same legal status as a tariff of rates, and the requirement of

section 6 of the Act to Regulate Commerce that every common carrier engaged in interstate transportation shall publish, post, and file its schedules of rates, fares, and charges, includes the classification of freight in force and governing such schedules. Therefore, classifications of freight governing the transportation of interstate shipments, either under joint through rates or through rates made up of the sum of the intermediate rates, must be published, posted, and filed in accordance with the rules and regulations of the Interstate Commerce Commission governing the publication, posting, and filing of schedules of rates.

§ 7. Methods of Developing Classifications.

The present methods of classification in effect on the several lines of railway in the United States are not uniform, nor do they afford anything like a satisfactory basis of comparison of like articles under one classification with the same articles in another classification. There has been much agitation, to which the encouraging effect of the Interstate Commerce Commission's endorsement of the movement has been added, for a uniform classification of property for interstate transportation throughout the entire country, but the doubt is ventured whether it will ever be practicable to establish such a classification. The differences in the classifications at present are caused by fundamentally different conditions in the several classification territories—conditions which can not be abruptly eradicated or changed except with most disastrous results to the commercial welfare of the territories affected. Classification of freight is often affected by such basic and fundamental conditions as density of population, which in turn affects the nature, quantity, and purpose of tre-

mendous quantities of traffic, and in most instances these very conditions have resulted from the maintenance during years of commercial development of certain transportation policies inclusive of a general basis of classification of the traffic involved in and responsible for the commercial development and the centralization of population. They have become so interwoven, the one with the other, that their interdependence may not be changed without the most distressing commercial disturbances. Again, the cost of construction, maintenance, and operation of railways—the relative cost of transportation—differs with the nature of the country traversed, and the cost of transportation is a vital factor in any classification of freight. A passing example is sufficient to illustrate: A western road with its cost of construction double, and sometimes treble the cost of construction of an eastern line, and its maintenance and operating cost 20 per cent greater than the eastern road's, could not be expected to maintain the same relative class ratings of articles as might obtain on the eastern railroad as to those articles of which the eastern line's tonnage was heavy and the western line's tonnage insignificant. Under such circumstances, there could be no equitable or economic distribution of the burden of transportation through the process of uniform classification.

There are now, and have been since the passage of the Act to Regulate Commerce, three general classifications governing the transportation of interstate traffic. Each applies to the lines operating in the three general divisions of the country, as follows: The Official Classification in the territory north of the Ohio and Potomac rivers and east of the Mississippi River to the Atlantic seaboard; the Western Classification in the territory west of the Mississippi River; and the Southern Classification in the terri-

tory south of the Ohio and Potomac rivers and east of the Mississippi River.

The scheme of classification in the Official Classification was the grouping of articles into six numbered classes, with two sub-classes, at 15 per cent less than second class and 20 per cent less third class. Recently a third sub-class has been added providing for the addition of an arbitrary amount to the fourth class rates. Thus this classification has practically nine classes or groups.

The Western Classification contains five numbered and five lettered classes, or ten classes or groups in all. In the territory designated as the Pacific Coast Territory, which embraces the Pacific slope, a modification of the Western Classification is effected through sub-classification and commodity rate tariffs known as the Trans-Continental Tariffs.

The structure of the Southern Classification is founded upon six numbered and seven lettered classes, making in all thirteen groups or classes.

In addition to these main classifications there are a good many local state classifications, promulgated by state authorities, which affect interstate traffic. A notable instance of this nature is the Illinois Classification governing shipments to and from the State of Illinois and border points in surrounding states. Many of these local state classifications are drastically different from the general classifications above mentioned.

The general classification will be taken up in a post section and fully analyzed.

These general classifications have been established and promulgated through associations or committees representative of the lines governed by a particular classification, and are known as the Official Classification Commit-

tee, the Western Classification Committee, and the Southern Classification Committee.

§ 8. General Principles of Freight Classification.

What are the general—the controlling—principles of the classification of freights? This question has been propounded to some of the brightest traffic minds in American railroading, and while their answers have glittered with smooth sounding generalities, they have been literally and emphatically devoid of a concrete analysis of the elements which determine the particular group or class to which a given article is assigned. It is a common answer to receive from the carrier that it was controlled by the nature of an article, its weight, its bulk, and its value in assigning the article to its classification group or class. If pressed to the point, he may reluctantly admit that consideration was given to the circumstances and conditions attendant upon its movement in different forms and in different quantities. Aside from the broadest generalities, it is an absurdity and a manifest impossibility to group together in one class only such articles as bear distinct resemblance to each other in kind, value, use, weight, bulk, risk, transportation and commercial relationship, volume, production area, primary market, and cost of transportation, under a classification scheme consisting of nine, ten or thirteen groups or classes. The number and variety of articles involved in our present-day commerce absolutely precludes such an argument.

A prominent factor then entered, and does now, into the classification of freight for transportation purposes, the effects of transportation and commercial competition; a competition that not infrequently would have driven given articles out of a market had not their relative adjustment

in the classification admitted of long hauls at comparatively low cost.

Any classification of property for transportation purposes must be, at best, a compromise—a compromise between the qualities and relations which commerce gives to an article and the relations between that article and other articles in a strict transportation sense. It would be hardly possible to find two articles of precisely similar freight qualities, in the sense of exhibiting similarity in those ethical attributes of character, value, risk, weight, bulk, use, and expense of handling, which the collaborators of classifications so valiantly stand by, but it is not difficult to discover transportation similarity or traffic likeness and substantial similarity of circumstances and conditions attendant upon the transportation of articles that in all other respects are dissimilar. It seems a travesty on logic to declare a general classification basis, reached through ethical considerations, and then, in order to give practical effect to such a classification, be obliged to employ as many exceptions thereto and modifications thereof as shall meet the nondiscriminatory requirements of the law that the classification of two articles shall be the same if they possess traffic likeness, and are transported in a contemporaneously rendered service and under substantially similar circumstances and conditions. Why make the corollary greater than the principle!

It is fundamental that we must concede the carrier the opportunity and the legitimate means of so distributing the burden of transportation that the returns in revenue shall include a reasonable profit on its investment. Particularly within the possession of the carriers are those facts with respect to the average tonnage ratios and the lines of movement of the articles classified, and though

to the carriers be left the right to establish a classified adjustment of these articles for the distribution of freight revenue, of this we may and should insist, that such classified adjustment must not be devoid of recognition of the relations of different articles determined by the transportation significance of each under the circumstances and conditions which attend its transportation.

It has been said that classification is, at best, a compromise. This is true. A compromise in the sense that the greatest degree of equity should be employed in the adjustment of so vast a number of commodities into relatively few groups; since any attempt to classify such articles in accordance with the precise and exact relationship of each to the other would simply take us back to first principles and necessitate the making of a specific rate for each individual commodity. Necessarily many articles must, therefore, be brought together into one group or class, and while there may be any lack of similarity in the precise elements of kind, use, value, volume, weight, bulk, risk, etc., they must be relatively associated by being of a "like kind of traffic," not in the sense of atomic or identical similarity, but in the broader view of a traffic likeness with other freight in the elements that determine strictly its freight qualities, such as bulk, density, weight, form, risk, and expense of handling, the like and contemporaneous service required in their transportation, and substantial similarity of circumstances and conditions under which they move. This latter consideration should be inclusive of all those conditions which in any wise alter, affect, or change the transportation significance of an article, such as geographical conditions, production, manufacture, and sale, competition commercially and between railroads, and the use of a commodity in the pro-

duction of articles of higher rate bearing qualities. Thus, we may find an equitable adjustment or grouping of articles of like bulk but of widely varying density, of similarity in weight but of vast difference in value, of dissimilar freight qualities but of traffic likeness, and best conserve both the revenues of the carriers and the interests of shippers because of the greater fluidity afforded commerce and the consequent increase in volume of traffic.

No classification can be made minute enough to conform to all the varying conditions of traffic and the varieties and grades, densities, and forms of the same article, because to do so would be to defeat the very purpose for which the classification is resorted to, namely, simplicity in fixing the freight rates. This is aptly illustrated in the case where a certain commodity is commonly shipped in certain form and the great bulk of it under substantially similar conditions. If a small shipper chooses to ship a small quantity of it in a materially different form and under conditions which cause the general classification of the article to rest as a hardship upon him, the general classification should not be considered unreasonable nor discriminatory upon that ground alone. The Commission recognized this principle in the **Planters' Compress Co.**, case, 11 I. C. C. Rep. 382, in refusing a lower classification to cotton compressed in round bales, even though in freight qualities such a bale occupied less space in a car, and was more conveniently and less expensively handled than the commonly used square bale. Even though the shipper of the round-bale put his commodity in form which would afford the carrier a greater profit per 100 pounds for the space occupied in its equipment, to have allowed a lower classification rating on the round-bale would have cast upon the great majority of shippers who used the

square-bale an unnecessary burden of hardship and expense. Thus, a window shade, unmounted on a wooden roller, is undeniably different in freight qualities than a window shade of the same kind which is mounted. The freight qualities may vary in bulk, weight, expense of handling, and to some degree in value and risk, but the principle of traffic likeness precludes any just or equitable differentiation in the ratings on the two forms of the article. These examples serve to emphasize the fact that the commonly ascribed considerations for the fixing of class or group ratings in freight classifications are sometimes more ethical than practical.

In addition to the broadly stated principles mentioned, there is still another consideration which effects an ideal, at least, classification, i. e., that the rating of an article shall not be so made that it moves upon such unremunerative rates as will cast a burden upon other commodities to recoup the loss resulting from its low-priced transportation.

§ 9. The Interstate Commerce Commission on the General Principles of Classification.

It is well to note that the Interstate Commerce Commission finds much to commend in the present classification methods, in its observation in the Procter & Gamble case quoted below, that the more the difficulties that surround a question of classification and rate in a particular instance are considered, the "more surprising it seems that on the whole apparent justice as between different articles has been so nearly attained."

In the case of **Grain Shippers' Association vs. Illinois Central Railroad Company**, 8 I. C. C. R. 158, 164, decided in 1899, the Commission said:

"In ideal traffic conditions certain elements would

be taken into account in establishing a freight rate. These, among others, would be the value of the commodity, the bulk of the commodity, the cost of service, the volume of traffic, etc. Under these conditions the value might be a pretty important factor in determining the freight rate. Under actual conditions, while an attempt was made to regard these various considerations, as a rule the controlling influence was competition. * * * Whatever traffic managers would be glad to do, at the present time they do not, and perhaps cannot, consider in the making of rates much beyond actual competitive conditions. Originally those various factors entered to an extent into the freight rate, and under their operation schemes of rates and classifications were built up. Those classifications and class rates serve in a measure as the basis of rates at the present time, having been gradually modified by the action of competitive forces. Taking those as a basis, the traffic managers today obtains for his company all he can without much reference to any system upon which rates ought to be constructed. He usually gets the best rate possible, without inquiring any further than he may find it convenient what in fact justifies that rate."

As the classification committee has been the brain of the classification machinery of the carriers, the Commission's observations of the methods of these committees is of interest.

In the case of **Procter & Gamble Co. vs. Cincinnati, etc., Railway Co.**, 4 I. C. C. Rep. 87, 3 I. C. R. 131, decided in 1890, the Commission remarked:

"There can never be certainty of exact justice in a question of classification and rate, and the more the difficulties that surround such a question in a particular instance are considered, the more surprising it seems that on the whole apparent justice as between different articles has been so nearly attained by classification committees. This together with

their great practical experience and study of the subject may well cause any revisory tribunal to hesitate to disturb the result of their deliberations in any instance. But it should not be overlooked that their training has been largely from the railroad's standpoint, and on this account their error, if either way, is more liable to be in favor of high rates. That they should always be exactly right is more than any earthly tribunal ever attained."

It is not enough to warrant a disturbance in a rate adjustment based upon a general classification basis, holds the Commission, when traffic and commercial conditions have adjusted themselves during a period of years to such relation of rates, that the conditions with respect to the classification adjustment are not ideal. There must be some intelligent and better scheme of classification attainable before a disturbance of these conditions is justifiable.

The Commission has declared that there is a distinction which should be recognized between the legal obligation of the carriers and the discretion they may lawfully exercise, but that in the formation of a classification, bulk, value, liability to damage, and similar elements affecting the desirability of the traffic should be considered, and that analogous articles should ordinarily rest in the same class. Were the desirability of the traffic to be made an important factor in its classification, the tendency to unjustly discriminate between articles might easily assume the proportions of a danger. The Commission, however, adds that in determining the rates to be paid by the different articles, consideration should be given to the establishment of fair relations between such commodities, and declares a classification which ignores all considerations of this nature is manifestly unjust and unreasonable.

It may be true, as the Commission states, that the tendency is to simplify and combine the classifications in

use upon a basis of approximate uniformity, but the evidence of such tendency having borne any practical results is not at all impressive.

Grain Shippers' Assn. vs. I. C. R. R. Co., 8 I. C. C. Rep. 158.
Planters' Comp. Co. vs. Cleve., etc., R. R. Co., 11 I. C. C. Rep. 382.

Met. Pav. Brick Co. vs. A. A. R. R. Co., 17 I. C. C. Rep. 197, 203.

Page vs. Del., etc., R. R. Co., 6 I. C. C. Rep. 548.
Myer vs. C., etc., R. R. Co., 9 I. C. C. Rep. 78, 83.
Re Tariffs & Classn., etc., 3 I. C. C. Rep. 19.

It is manifest that there can not be mathematical accuracy in the determination of the relative groupings of articles for the purpose of forming a basis for the rates. It has been heretofore stated that classification is a compromise. It is more than a single compromise; it is many compromises blended into a composite approximation of the relative freight qualities and conditions of transportation of the articles of commerce. No system of mathematical computation yet invented by man is capable of reducing all the vagaries of this traffic to a basis of exact relationship. The Commission finds that "the best that is obtainable in this direction is reasonable and substantial approximation." Assume, for the moment, a classification mathematically adjusted upon the factor of value alone. The infinite differences in values would cause the groups in the classification to be "too large and the refinement too subtle for practical operation."

In the **Stowe-Fuller Company** case, 12 I. C. C. Rep. 215, 219, the Commission declared that it could not "regard a classification as scientific, or a difference in rates as well based, which is altogether founded upon a distinction that has no transportation significance. (Compare **Ft. Smith Traffic Bureau, vs. St. Louis, etc. R. R. Co.**, 13 I. C. C. Rep. 651 [1908]). A classification must be based upon a real distinction from a transportation standpoint.

While the Commission has not in words approved the general principle followed by carriers that an article should be designated in the classification according to some visible token which can be readily seen and distinguished, so that frauds on the part of the shipper can be easily detected and prevented, the Commission has seemed to be impressed with the necessity for such a rule. With a suggestion merely that classifications ought to provide that articles of a certain value should take a certain rate, the Commission declined to fix a general rule for the classification of cotton and woolen garments distinguishing as to value on the ground of impracticability.

It has been claimed by carriers that classifications must sometimes be varied to meet competitive conditions peculiar to a particular region, where the conditions are unlike those obtaining in any other portion of the country, as, for instance, in the case of fire, building, and paving brick in Central Freight Association Territory, and that such situations should be treated locally. In the case of the **Metropolitan Paving Brick Co. vs. A. A. R. R. Co.**, 17 I. C. C. Rep. 197, 203 (1909), the Commission said:

“Carriers, within proper limitations, may take competition into consideration in classifying freight. Competition that may be considered in a proper case not only includes that between carriers, but also that of the commodity produced in one section of the country with the same commodity produced in another section and sometimes competition of one kind of traffic with another kind.”

In the same case, however, the Commission condemned any classification which to any considerable extent rested upon the use to which the commodity is to be put after it is sold. “This would lead to much hardship to many

shippers and constitutes a basis of classification which the Commission has for obvious reasons refused to sanction."

Assn. of Un. Made Garment Mfgs., etc., vs. C. & N. W. Ry. Co., 16 I. C. C. Rep. 405, 407.

The Commission has reduced the classification rating of an article where there was no apparent difference in bulk, value, or liability to damage between it and analogous articles of a lower rating; in other words, the articles entitled to the comparison possessed no substantial differences in freight qualities, or conditions of transportation. It has also recognized the manner of packing of an article as a proper element of consideration in the classification of the article.

Landers, Frary & Clark vs. Atchison, etc., Ry. Co., 17 I. C. C. Rep. 511, 513 (1910).

Metropolitan Paving Brick Co. vs. A. A. R. R. Co., 17 I. C. C. Rep. 197, 201 (1909).

The attitude of the Commission on the classification of property for transportation, prior to the 1910 amendment of the Act of Regulate Commerce, may well be summarized in its own language: "Classification is not an exact science; nor may the rating accorded a particular article be determined by the yardstick, the scale, and the dollar. The volume and desirability of the traffic, the hazard of the carriage, and the possibility or probability of misrepresentation of the article are considerations of primary importance in classification. At best it is but a grouping and when the approximation resulting from it is not found to cause the exaction of an unreasonable or a discriminatory charge it will not be disturbed."

The Commission has declared there should be an unvarying relation between articles of substantial traffic likeness, and not susceptible to a difference in rating due

to a real transportation distinction, where they are packed and shipped in the same manner.

Forest City Frt. Bu. vs. A. A. R. R. Co., 18 I. C. C. Rep. 205, 206.

Rose vs. B. & A. R. R. Co., 18 I. C. C. Rep. 427, 429.

Where it is manifestly impossible to so classify analogous articles as to prevent the mis-billing of one of the articles by shippers in order to secure lower rates, the carriers are justified in making no difference in their classification.

The fact that a commodity moves in large quantity in full-capacity load of cars, and the liability of damage or loss is small, is an important element in determining its classification.

Hydraulic-Press Brick Co. vs. M. & O. R. R. Co., 19 I. C. C. Rep. 530, 531.

"In framing classifications and rates, no one consideration is controlling. Bulk, value, liability to waste or injury in transit, weight, form in which tendered, etc., must be taken into consideration."

Ford Co. vs. M. C. R. R. Co., 19 I. C. C. Rep. 507, 509.

If the differences in the classification of articles are not founded upon distinctions of transportation significance, such differentiations can only lead to almost endless multiplication of rates having no excuse for their existence except the uses to be made of the articles affected.

Ft. Smith Traffic Bureau vs. St. Louis, etc., R. R. Co., 13 I. C. C. Rep. 651, 656.

Where the classification of an article depends upon its value, the danger is always present of the article actually moving on a lower rate as of the lowest value of a similar article. This does not contemplate released value, but

declared value, where if the disposition of the shipper is to be dishonest he is encouraged to profit over his more honorable competitor by misrepresentation and declaration of false value. While such action on the part of the shipper would constitute the offense of false representation or false billing and subject him to heavy penalties, as an element of classification of similar articles of different values, it is a lurking danger requiring vigilant consideration.

Un. Pac. Tea Co. vs. P. R. R. Co., 14 I. C. C. Rep. 545, 547 (1908).

Barr Chemical Works vs. P. & R. Ry. Co., 20 I. C. C. Rep. 77, 78 (1911).

Liability to damage and contamination of other freight is a potential factor in the classification of commodities in a liquid state. It may be stated as a general rule that liquids are classified usually higher than solids.

Natl. Petrol. Assn. vs. A. A. R. R. Co., 14 I. C. C. Rep. 272, 276 (1908).

The condition of an article as new or second-hand, and in an extreme sense an article becomes second-hand as soon as it leaves the possession of the seller, does not materially affect its transportation requirements, and it would be difficult to draw the line of value between new and second-hand articles where the values are varying and uncertain, and where a preponderant factor lies in the fact that damage to either the new or second-hand article results in approximately the same cost to the carrier.

Whitcomb vs. C. & N. W. Ry. Co., 15 I. C. C. Rep. 27, 28 (1909).

The Commission condemns as a basis for determining rates the promulgation of a classification the terms of which are indefinite or impractical of application, either in

whole or in part. "The classification of an article of commerce should be plainly and clearly stated in terms that the shipping public may readily understand. Tariffs are to be construed according to their language, and the intention of the person who framed the tariff, or the arbitrary practice of the carriers thereunder may not be looked up to as authoritative construction thereof."

Pac. Coast Biscuit Co. vs. S. P. & S. Ry. Co., 20 I. C. C. Rep. 546, 649 (1911).

Where two articles are closely related in traffic qualities and differ only in weight and thickness, the two latter factors should not alone justify a substantial difference in rating.

Barrett Mfg. Co. vs. Chicago, etc., Ry. Co., 20 I. C. C. Rep. 79, 80 (1911).

"While every effort conducive to uniformity of classification is to be commended, it does not follow that that result should be attained by accepting as a standard a classification prescribing a rate which, when applied to a given commodity or territory, becomes unreasonable."

In re Advances in Rates on Locomotives and Tenders, 21 I. C. C. Rep. 103, 107 (1911).

The Commission holds that "a comparison of ratings in the different classifications is by no means a guide to the relative transportation charge unless the class rates under the several classifications are also considered."

Milburn Wagon Co. vs. L. S. & M. S. Ry. Co., 22 I. C. C. Rep. 93, 102 (1911).

In the following review of the decisions of the Commission affecting elements of classification, it is worthy of notice that the Commission has at all times given con-

sideration to classification making as a great public function in which the results should not alone subserve the carriers' interests, but be compatible with public interests.

In **Pyle & Sons vs. E. T., V. & G. Ry. Co.**, 1 I. C. C. Rep. 465, the Commission said:

"In grouping articles together in a class for the purpose of fixing rates upon these articles several considerations are usually deemed by the carrier of a very controlling nature. Among these may be mentioned bulk, and space occupied, value, hazardous and extra-hazardous freight, liability to waste or injury in transit, weight, or the like."

In **Thurber vs. N. Y. C. & H. R. R. Co.**, 3 I. C. C. Rep. 473, the Commission said:

"A classification is not a fixed condition to which other interests must necessarily yield. It is the creation of carriers for their own and the public convenience, and may be changed by its creators. If incompatible with public interests, it should be modified to subserve those interests."

In **Warner vs. N. C. C. & H. R. R. Co.**, 4 I. C. C. Rep. 32, it was held that:

"Both the market value of the commodities and the volume of business they furnish to carriers are proper elements to be considered in classification."

In **Harvard Co. vs. Penna. Co.**, 4 I. C. C. Rep. 212, the evidence showed that the controlling conditions determining the classification of goods by the Official Classification Committee were bulk and space occupied, the weight of the package as compared with its dimensions, the value of the goods, the volume of traffic, and whether the goods

could be loaded in a car so as to get a full carload. In this case the Commission held:

"That a reasonable, fair, and just difference may be made in proportion to quantity hauled of the same article in a full carload and in less-than-carload lots, and that respective rates charged upon each according to weight, is a principle that has been openly recognized by the Commission. That a rate maker may, and in fact should, take into consideration * * * such controlling conditions, in preparing a classification, as bulk and space occupied, the weight of the article as compared with its dimensions, its value, whether as a matter of fact it is hauled in carloads as well as in less than carloads, are each and all true. But the mere fact that one article, for example, sewing machines, is shipped 'in greater quantities', and of no large difference in bulk, weight, and value, and of no appreciable difference in expense of handling and of haul, that this alone should constitute in itself any reason why the former (carloads) should enjoy lower rates or classification than the latter (less-than-carloads), merely for the reason that they are shipped 'in greater quantities' is a doctrine to which we can not give assent. In such a case mere quantity not measured by a recognized unit of quantity adapted to carriage and lessening the expense of handling by carriage, can not be allowed to affect rates in transportation of property."

In **Coxe Bros. & Co. vs. L. V. R. R. Co.**, 4 I. C. C. Rep. 535, the Commission said:

"For convenience in making transportation rates and charges, freight is arranged and put into different classes according to expense of carriage, bulk, value, risk, competition, and other considerations affecting the cost and value of the transportation service."

In **Page vs. D., L. & W. R. R. Co.**, 6 I. C. C. Rep. 548, it was held:

"The elements of bulk, weight, value, and character

are made considerations in determining approximately what freight articles are so analogous as to entitle them to the same classification."

In **Meyer vs. C., C., C. & St. L. Ry. Co.**, 9 I. C. C. Rep. 78, it was stated by the Commission:

"It has been repeatedly claimed by carriers and repeatedly held by the Commission that in the form of a classification bulk, value, liability to damage, and similar elements affecting the desirability of the traffic should be considered, and that analogous articles should ordinarily be placed in the same class * * * Manifestly in determining what freight rates shall be borne by different commodities an attempt should be made to obtain a fair relation between those commodities, and a classification which utterly ignores all considerations of this kind or which utterly fails to give due weight to such considerations is unjust and unreasonable."

In **National Hay Asso. vs. L. S. & M. S. R. R. Co.**, 9 I. C. C. Rep. 264 the Commission said:

"In a classification such as the official, which contains but six general classes, it is manifestly impossible to bring together in each class only such articles as resemble each other in the elements of character, use, value, volume, bulk, weight, risk, and expense of handling, which have so often been referred to as governing conditions in freight classifications. Besides these general considerations affecting classifications, competition is an important factor. Such competition includes not only that between carriers, but also that of a commodity produced in one section with the same commodity produced in another section, and sometimes the competition of one kind of traffic with another."

In **Procter & Gamble Co. vs. C. H. & D. R. R. Co.** 9 I. C. C. Rep. 440, the Commission held:

"Freight classification is based upon the relations

which commodities bear to each other in such respects as character, use, bulk, weight, value, tonnage or volume, risk, cost of carriage, ease of handling, and controlling conditions caused by competition."

In **Planters' Compress Co. vs. C., C. & St. L. Ry. Co.**, 11 I. C. C. Rep. 382, the Commission held:

"No classification can be so minute as to conform to the different varieties and conditions of traffic. To separate different grades or densities of the same article into different classes with varying rates, even if it could be accomplished, would go far to defeat the real purposes of classification, as was held by the Commission in **Derr Mfg. Co. vs. P. R. R. Co.**, 9 I. C. C. Rep. 646."

In **Stowe-Fuller Co. vs. P. R. R. Co.**, 12 I. C. C. Rep. 215, the Commission held:

"Classification must be based upon a real distinction from a transportation standpoint. * * * To hold otherwise would be to promote false billing on the part of shippers, and to require the carriers, if they would avoid the penalty of the law, to make a practically impossible examination into the use to which each shipment of these brick was put."

In **Fort Smith Traffic Bureau vs. St. L. & S. F. R. R. Co.**, 13 I. C. C. Rep. 651, the Commission said:

"In **Stowe-Fuller vs. Pennsylvania Co.**, 12 I. C. C. Rep. 215, we held that classification must be based upon a real distinction from a transportation standpoint. The Commission can not regard a classification as scientific or a difference in rates as well based which is altogether founded upon a distinction that has no transportation significance. Such a differentiation would lead to an almost endless multiplication of rates, which could find no excuse save the use which might be made of the article transported."

In **Metropolitan Paving Brick Co. vs. Ann Arbor R. R. Co.**, 17 I. C. C. Rep. 197, the Commission said:

"It is well settled that in making a classification of articles bulk, value, liability to loss and damage, and similar elements affecting the desirability of the traffic should be considered, and articles which are analogous in character should ordinarily be placed in the same class. * * * Carriers, within proper limitations may take competition into consideration in classifying freight. Competition that may be considered in proper cases not only includes that between carriers, but also that of the commodity produced in one section of the country with the same commodity produced in another section, and sometimes competition of one kind of traffic with another."

In **In re Advances on Coal**, 22 I. C. C. Rep. 604, it was held by the Commission that its power over classification of freight necessarily involves "considerations of the value of service given to the shipper, as well as the cost and value of the service furnished by the carrier."

In **Rickards vs. A. C. L. R. R. Co.**, 23 I. C. C. Rep. 239, 240, the Commission said:

"The fact that certain traffic is hauled in trainload lots while complainant's traffic moves in carloads cannot be made the basis of a difference in rates."

In **Sunderland Bros. vs. S. L. & S. F. R. R. Co.**, 23 I. C. C. Rep. 259, 262, it was held that:

"Rules, regulations and charges affecting the ultimate cost of transportation must be made with a reasonable regard for the nature of the commodity transported and without undue discrimination between localities or shippers."

In re **Western Classification No. 51**, 25 I. C. C. Rep. 442, the Commission dwelt at length on the elements of classification; thus:

Classification is a public function. Public business can not be conducted in a private way. Hearings of classification committees should be made public, after due notice to interested parties, including state commissions and the Interstate Commerce Commission. A record of facts and arguments should be made. As rapidly as items, or groups of items, have been disposed of by the classification committee they should be published in accordance with law. In the case of a protest to the Commission, the record made up before the committee should be promptly submitted to the Commission. On the basis of this record, supplemented when necessary by additional inquiries, the Commission will be able to decide whether or not to suspend a proposed change in classification.

A compilation of classification units, expressing the relation to one another of weight, space, and value, should be made, as far as practicable, for every item in the classification, and given due consideration.

The work of classification should be confined to classification as such, entirely separate from the question of rates or revenues of carriers. Classification and rates and revenues should be treated separately. Having completed a new classification along the lines suggested, each carrier can readjust its rates on the basis of that classification in such manner as to preserve its existing revenues. The sufficiency or insufficiency of certain revenues and the level of particular rates or schedules are separate questions. A classification is a universal tariff from which the schedules of individual carriers should not depart, except in cases demanded by special conditions. Commodity tariffs in restricted number may always remain a necessity.

The Commission has repeatedly emphasized the necessity of greater uniformity in classification. Num-

erous quotations, bearing upon this subject, from decisions and annual reports of the Commission are given. Reference was made to the past utterances of the Commission with regard to the elements of classification, an enumeration of which is made.

Generally speaking carload ratings should be established whenever carload quantities are offered for shipment and the public interest requires it. The relative merit of a system of any quantity ratings as compared with a system of carload and less-than-carload ratings was left for future consideration.

Liberal provisions should be made for mixtures, Artificial restrictions upon mixtures are restrictions upon the freedom of trade and commerce, with a tendency to militate against the small man. Mixtures result in a better utilization of car space; they lessen the demands upon terminal properties, they decrease the expense of operation, and facilitate the movement of freight. A brief statement was made of the arguments for and against the incorporation in western classification of rule 10 of official classification.

An excessive difference between the carload and less-than-carload rates on the same commodity results in an undue preference to the carload shipper. Considerable diversity in the spread between carload and less-than-carload ratings was revealed. The relations between carload and less-than-carload ratings should be established in accordance with some consistent principle throughout the classification and the rate schedules which may be constructed upon it. In establishing a proper relation, consideration should be given to the relative cost of handling, the demands upon terminal properties, and the utilization of equipment.

Carriers should take into consideration both the physical minimum and the commercial minimum in deciding upon a classification minimum to govern carload shipments throughout the country and provide themselves with cars of corresponding sizes. What

these shall be must be determined in the light of all the facts applicable to each individual case. The physical minimum is that minimum which represents the weight or bulk quantities which can be loaded into a car from the point of view of space or the theoretical number of packages capable of being loaded into a car, determined by dividing the cubical contents of the car by the cubical contents of one of the packages, multiplied by the weight of the package possibly with some consideration of the dimensions of the package. The commercial minimum is that minimum which represents the unit of purchase and sale of the commodity in question as established by custom and the conditions existing in that trade and in the territory, in which it governs at the time the minimum was established. The physical minimum would consider only physical loading capacity, while the commercial minimum would consider in addition trade requirements, conditions of manufacture, distribution, and consumption.

From a classification standpoint, the security of a package may with propriety be considered in fixing the rating. A package which is less desirable from a transportation standpoint may be given a higher rating than one which is more desirable. The approval of this rule, however, does not sanction disproportionate and arbitrary increases in the rating of an article when offered in a less desirable package. There should be the same relation between the increased rating and the increase in the risk, difficulty of handling, and other proper considerations.

It is the duty of the delivering carrier to collect the lawful rates on shipments and to correct any errors that may have been made by the agents of the initial carrier in billing or in the collection of prepaid charges. This includes misbilling due to a wrong description of the container. A provision should be inserted that, if the classification of a shipment is properly raised at the point of destination, by reason of the character of the container, the initial carrier shall

be liable for the difference, unless misrepresentation was made.

Every effort of the carriers to compel accuracy and honesty in descriptions of freight deserves support. Inadvertent and unknowing misdescriptions are unfortunate in their possible discriminatory effect; conscious misrepresentations and misdescriptions are criminal and should be rigorously suppressed.

It is the right and duty of carriers to protect other freight from commodities which are likely to damage it. Certain perishable freight may at times, for sufficient reason, be refused under proper tariff provision or the classification.

In accordance with established law, classification properly may not be predicated upon the use to be made of an article. Use may, however, be considered as evidence of value. Value has a bearing upon rating in the classification.

In **Western Classification No. 51**, 25 I. C. C. Rep. 442, 452, it was held that while the classification unit test may not finally determine the classification of an article, it constitutes a basis for comparison with other articles. When all the modifying conditions and facts are known, a fair classification relation may be established among articles through the aid of this classification unit.

The making of a freight classification is a great public function, and the process should be given full publicity, the body of experts employed therein holding public hearings on everything pertaining to classification.

In **Boston Chamber of Commerce vs. A. T. & S. F. Ry. Co.**, 28 I. C. C. Rep. 230, 232, the Commission said:

"While classification is a material factor to be considered in the determination of freight rates, it is not the only factor. The rate cannot vary between every station according to the grades or other physical

incidents of the transportation. If this rule were to be applied, the rate from every classification point where full carloads are made up and sent out must be less than from intermediate points, where only part carloads are taken up."

§ 10. The Interstate Commerce Commission on Uniform Classification.

As early as 1894, the Interstate Commerce Commission reported to Congress, in its Annual Report for that year, that "it is interesting to note definite steps have been taken by the carriers in different sections of the country, now operating under the three principal freight classifications, to establish a standard classification which shall take the place of existing separate classifications. This work is now well in hand, the carriers from the different classification territories having assigned persons especially qualified for the work as their representatives on a committee which has been organized embracing the combined interests. A committee of executive officers of the same interests has also been formed, which will exercise supervision of the work to be formed by the committee first named. From the foregoing movement, as well as from the information which has reached the Commission, it is quite evident that the carriers are impressed with the desirability of harmonizing the conflicting features of the existing classifications for the convenience of the public, as well as to bring about uniformity in the provisions of a classification, which are essentially direct factors in the charges for transportation, as also the stability in the latter, which will necessarily follow under these arrangements; and it may be said that, under the organization which has been perfected by the carriers, material progress may be expected in connection with this important matter."

This effort looking toward the establishment of a uniform classification basis for the entire country applicable to interstate transportation came to naught.

The Commission brought the matter of uniform classification to the attention of the Congress in its Twenty-First Annual Report, for the year 1907, as follows:

In the Eleventh Annual Report of the Interstate Commerce Commission to Congress the matter of uniform classification was treated of at considerable length, and it was stated that a single classification was regarded as essential to insure compliance with the law and to promote greater economy in the administration and conduct of transportation. The Commission also expressed the view that it was of interest and value to the carriers themselves.

It was further pointed out that the present diversity, due to the various classifications, results in many discriminations and losses, and that there is no single step that could be taken by the carriers which would go so far to insure the establishment of stable rates as the adoption of a single and comparatively fixed classification. The situation, as disclosed in the report referred to, of the lack of progress that had been made by the carriers in this connection in the preceding years led the Commission to suggest that it be authorized and required to prepare such a classification, and to indorse the action which was proposed by a bill then pending in the Senate.

In reaching these conclusions, the Commission was not unmindful of the work involved in making uniform the then existing classifications, and took occasion to say: "To establish theoretical, and, to some extent, arbitrary classes, whether they number six or twenty-five, and to thereby provide rates for all articles which yield the necessary revenues for the carriers, do full justice to local interests and the whole country, and satisfy the reasonable demands of shippers everywhere, is a task of great magnitude, and presents many obvious and serious difficulties,

* * * in the nature of the case there must be concessions and compromises, for it would be too much to expect that such a change in transportation methods could be effected without some friction and some losses." It was also stated that "it is evident the carriers themselves, by mutual concessions and through voluntary and harmonious action, can accomplish this reform with much less losses, embarrassment and friction than will presumably result if Congress or some delegated tribunal establishes a classification of them."

The foregoing briefly sets forth the views of the Commission as to the desirability of a uniform freight classification; it also indicates the extent of the undertaking, as well as the further view repeatedly expressed by the Commission, that the task is one which should be primarily left to the carriers to work out.

In speaking of the fundamental basis of such a uniform classification, the Commission, in its Eight Annual Report to Congress for the year 1894, said:

"The accomplishment of uniform classification involves only a continuance of the work upon the line of rendering individual interest and local advantage subservient to the general welfare. That this will not require any real sacrifice or injury is proven by the absence of any proposition to retrace a single step in the work which has been done towards securing uniformity; on the contrary, all interested parties conceded the great desirability, and most commercial interests urge the necessity, of a single classification. * * *

"The governing considerations in the construction of a classification are first, the number of classes which the classification shall contain, * * * and second, how the different articles of commerce shall be distributed among these classes according to their character, weight, value, bulk, ease of transportation and risk of carriage. The rules for determining similarity of freight articles in these particulars ought to

be common to all sections, and not varied, as they now are, to accommodate carrying customs or transportation methods in different sections. One of the greatest benefits which will result from a uniform classification will be the evolution of admittedly just, general rules for determining the relative classification of commodities."

While the efforts of the Uniform Classification Committee referred to by the Commission in its Eighth, Eleventh, and Twenty-First Annual reports failed of material results, a committee is now engaged in an effort to determine a uniform basis upon which a general classification may be promulgated by the Commission, the Commission now being empowered to prescribe and enforce just and reasonable individual or joint classifications. It is not possible at this time, however, to forestate what degree of success will ultimately attend the efforts of this Committee.

The Uniform Classification Committee has particularly devoted its labors to the unification of the descriptions, rules and regulations in the Official, Southern and Western classification schedules.

In a report made by the committee in 1912, it was then estimated that 75 per cent of the descriptions, rules, and regulations in the three interstate classifications had been made uniform.

In the mid-year of 1916 it was estimated that this work of the Uniform Classification Committee would be completed within the next eight or ten months.

CHAPTER IX.

THE ACT TO REGULATE COMMERCE AS AMENDED (CONTINUED).

Amplification of Sections. (Continued.)

- § 1. Amplification of Section 1 as Amended (Continued)—Administrative Regulation of Reasonableness of Rates by the Interstate Commerce Commission.
- § 2. Joint Rates to Adjacent Foreign Countries Must Be Reasonable.
- § 3. Distinguishment of Terms "Legal" and "Lawful" as Applied to Rates.
- § 4. Right of Carrier to Initiate Rates.
- § 5. Relative Rates—License of Comparison.
- § 6. Comparison of Rates on Different Lines.
- § 7. Comparison of Rates on Different Branches of Same Line.
- § 8. Comparison with Division of Joint Rate.
- § 9. Comparison with Water Compelled Rates.
- § 10. Comparison with Rates Fixed by State Authority.
- § 11. Comparison with Rates Established by Interstate Commerce Commission.
- § 12. Illustrating Standards of Comparison by Interstate Commerce Commission.
- § 13. Adjudicated Rates—Maintaining Rate Reduced After Complaint is filed.
 - (1) Carrier May Withdraw Rate Condemned by Commission in Another Case.
 - (2) Reduction of Rate when Formal Complaint Against It Is Pending.
- § 14. Rate Advanced For Short Period with Return to Former Rate Raises Presumption of Unreasonableness of Advanced Rate.
 - (1) Advance Justified when Effect Is to Equalize Nearby Rates.
 - (2) When Advance in Carload Minimum Weight Is Not an Advance in Rate.

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- § 15. Agreement as to Rates; Validity and Effect of Between Shipper and Carrier.
- § 16. Bill of Lading—Shipments Tendered Under Other than Conditions of Subject to Higher Rates.
- § 17. Burden of Proof of Reasonableness of Rates.
 - (1) Carriers May Not Benefit by Another Carrier's Meeting Burden of Proof Requirement.
- § 18. Capitalization.
- § 19. Combination Among Carriers when Rates Are Product of.

CHAPTER IX.

THE ACT TO REGULATE COMMERCE AS AMENDED (CONTINUED).

Amplification of Sections. (Continued.)

§ 1. Amplification of Section 1 as Amended (Continued)— Administrative Regulation of Reasonableness of Rates by the Interstate Commerce Commission.

The administrative regulation by the Interstate Commerce Commission of interstate transportation rates and charges embodies a categorical application of the major principle of the Act to Regulate Commerce—that all such rates and charges must be just and reasonable.

It must be obvious to all who interest themselves in shipping and transportation affairs, that no legislative act could be so fashioned, in a practical sense, as to establish a concrete rule of action for each and every shipping and transportation transaction. Economic diversity in this country alone precludes the practicalness of such a possibility.

Created for the purpose and charged as it is with administering the principles of legislation in their practical details, the Interstate Commerce Commission has investigated, passed upon and required the observance of reasonableness in transportation rates and charges in accordance with a proper construction of the Act to Regulate Commerce. The magnitude of its activities in its administrative regulation of rates has been tremendous and its labors attended with, and often hampered by, both eco-

nomie and legal difficulties. While adhering in no strict sense to rules of precedent in its determination of the absolute or relative reasonableness of transportation rates and charges, the Commission has administratively observed the uniform purposes of the regulating laws to such an extent that the elements of reasonableness or unreasonableness, which it has approved or disapproved, may be correlated and set forth as workable standards to be observed in the construction and application of rates fulfilling the requirements of government regulation.

As we proceed with the subsequent sections relating to the reasonableness of rates and charges, we will become more and more appreciative of the vast scope which has been given to the Commission's administration of the regulatory laws in their relation to rates and it is to the shipper who bears the great burden of transportation cost to whom the benefits of this administration of the law must inevitably inure, will he but do his part. The economic opportunity thus offered to the shipper to control, within the legal limitations prescribed, the third greatest cost in his business—the cost of distributing his goods—can only be availed of by him by accurately observing the rules and regulations in their workable aspect. In the sections to follow, devoted to this all-important subject of rate control, will be found not only the rules of law obtaining but the rules of action expressed in usable form.

§ 2. Joint Rates to Adjacent Foreign Countries Must be Reasonable.

The Act to Regulate Commerce confers jurisdiction over common carriers engaged in the transportation of persons or property from any place in the United States to an adjacent foreign country. That act further provides that "all charges made for any service rendered or to be ren-

dered, in the transportation of passengers or property, as aforesaid," shall be just and reasonable. The carriers of the United States (which are referred to as American carriers) are therefore under requirement to impose reasonable charges for the transportation service rendered by them within the United States, even though the ultimate destination lies beyond its confines.

If an American line saw fit, it might doubtless name a rate to the Mexican border, and in that event the Commission could deal only with the service up to the Mexican boundary line. Instead of adopting that course the American carriers, in connection with the Mexican carriers, have in the past established joint charges for a through service from the point of origin in the United States to the point of destination in Mexico, and afforded no information as to the part of that charge which would accrue to the American lines. This did not however relieve the American carriers from the obligation to impose a reasonable charge for their service; nor did it make it impossible for the Commission to proceed to determine the reasonableness of that part of the charge without examining the entire through rate.

Clearly, the Commission has no authority to establish a rate of transportation in Mexico; nor to order the maintenance of a rate for the future from a point in the United States to a point in Mexico; but it may require the American carriers to cease and desist from continuing to apply a joint through rate, or any rule, regulation, or practice in connection with that joint rate, and it may, where such rate has been voluntarily maintained, inquire whether it has been reasonable, and if found unreasonable, award damages.

See also:

- Re Rates Louisiana Ry. & Nav. Co., 22 I. C. C. Rep. 558.
 Act to Regulate Commerce, section 1.
 Lykes Steamship Line vs. Commercial Union, 13 I. C. C.
 Rep. 310, 315.

See also:

- I. C. Committee Report to Senate, 1886, that "while the provisions of the bill are made to apply mainly to the regulation of interstate commerce, in order to regulate such commerce fairly and effectively it has been deemed necessary to extend its application also to certain classes of foreign commerce which are intimately intermingled with interstate commerce, such as shipments between the United States and adjacent countries by railroad."

The Commission is without jurisdiction over rates for transportation or of railroads and steamship lines located, owned, and operated wholly within an adjacent foreign country. And it can not afford relief for failure to furnish cars of adequate size in an adjacent foreign country. Nor has it any authority over a portion of a rate separately established via a line of railroad beyond the borders of the United States.

- Eagle Pass Lumber Co. vs. Natl. Rys. of Mexico, 25 I. C. C. Rep. 5.
 Humboldt S. S. Co. vs. White Pass & Yukon Route, 25 I. C. C. Rep. 136, 140.
 Fullerton Lumber Co. vs. B. B. & B. C. R. R. Co., 25 I. C. C. Rep. 376, 378.
 Young & Sons vs. C. P. Ry. Co., Unrep. Op. A-35.

The Commission administratively first held to the view that it did not possess jurisdiction over common carriers in Alaska, but the Supreme Court construed the authority of the statute to be inclusive of regulation of carriers operating in Alaska, between Alaska and the United States and between Alaska and an adjacent foreign country.

- I. C. C. vs. Humboldt S. S. Co., 224 U. S. 474.

See also:

I. C. C. Confr. Rulings Bull. No. 6. Rulings No. 118, 126, 191, 256, 269, 294, 318, 353.

Compare:

Re Investigation of Acts of Grand Trunk Ry. of Canada, 3 I. C. C. Rep. 89, 2 I. C. Rep. 496.

See also "The Interstate Commerce Law," part I, chapter on "Amplification of Section 1," subj. "Carriers Subject to the Act," ante.

§ 3. Distinguishment of Terms "Legal" and "Lawful" as Applied to Rates.

In **Poor Grain Co. vs. Chicago, Burlington & Quincy R. R. Co.**, 12 I. C. C. Rep. 418, the Commission said (page 425):

"A rate may be lawful in the sense that it is the regularly published rate and therefore the only rate under which traffic may lawfully move, and yet at the same time be unlawful in the sense that it is excessive and unreasonable in amount. Its lawfulness as the published rate is to be tested by the mere inspection of the schedules on file with the Commission; and if found to have been published in conformity with the requirements of law that rate must in all cases be charged and actually collected by the carrier even though it may be excessive. Whether or not it is unlawful in the sense of being excessive depends upon all the circumstances and conditions that are recognized as having a legitimate influence in rate making."

And in **Coomes vs. Chicago, Milwaukee & St. Paul Ry. Co.**, 13 I. C. C. Rep. 192, the Commission said (page 194):

"Although a rate is by the terms of the law binding upon all so long as it remains in effect, such rate may, nevertheless, upon proper procedure, be found and declared to be unlawful in that it is unreasonably

high or unduly discriminatory, and become in respect to shipments made while the unjust rate was in effect the basis of an award in damages. To hold otherwise would be to make the mere establishment of rates by a carrier conclusive of their reasonableness and justness while in effect. * * * While the establishment of rates by the carrier in the manner required by law fixes the standard of lawful rates for the time being and so long as such established rates are in effect, this standard is by no means conclusive of their reasonableness and justness."

It has, on the other hand, also been insisted that this view of a rate established by the carrier in the manner prescribed by law is illogical; that if the rate was lawful when paid by the shipper it must be held and considered to be a lawful rate for all purposes so far as shipments in the past are concerned; that it is a contradiction of terms to say that the published rate is the legal rate and so hold at the same time that it may be treated as an unreasonable and unjust and therefore an unlawful rate; and that so long as it remains the legal rate, that is to say, until it is voluntarily changed, or ordered by the Commission to be changed, the payment of the published rate can not lawfully be made the basis of a subsequent claim for damages with respect to a shipment that moved under it.

The Commission has not been able to take this view of the matter. It has been said that the word **legal** looks more to the letter and **lawful** to the spirit of the law; that **legal** imports rather that the forms of law are observed and the rules prescribed obeyed and the word **lawful** that the Act is rightful in substance. The two words may aptly be used as illustrative of the distinction that we have attempted to draw in the cases cited.

It is provided in section 6 of the Act that no carrier shall collect or receive a greater or less compensation than

the rates specified in the tariff in effect at the time of the movement. Other provisions of law make it a misdemeanor for the carrier to depart from the published rate. In dealing with shippers the carrier is therefore required to conform the freight charges actually collected to the amount fixed in its published tariffs. In that sense the published rate in effect at the time of the movement is therefore the legal rate. It is what the letter of the law requires the shipper to pay and the carrier to collect.

But the first section of the Act, following the rule of the common law, declares that all charges for services rendered by a carrier in the transportation of passengers or property shall be reasonable and just. It also declares every unjust and unreasonable charge for such a service to be unlawful. In publishing a rate or a schedule of rates the carrier therefore acts under this admonition of the statute. If it promulgates a rate in violation of this injunction, that is to say, if it establishes a rate that is excessive and therefore unjust and unreasonable, it is not a lawful rate when its reasonableness is subsequently questioned upon complaint filed. While it may be, and indeed is, the legal rate—the rate that must be paid by the shipper and collected by the carrier because it is the published rate—the mere publication can not make a rate lawful that is unreasonable and excessive. No rate can be lawful, in the sense of being immune from attack, either with respect to past or future shipments, if it be excessive and unreasonable in amount.

The Commission has therefore held that the Act not only gives a remedy against excessive and unreasonable rates as applied to shipments to be made in the future, but also affords the shipper a means of recovering excessive charges on shipments made by him in the past under rates that were unjust and unreasonable. A careful reading of

the Act, and particularly of sections 8, 9, 13, 14, and 16, seems to leave no doubt that the Commission, upon complaint made and hearing had, may award damages on past shipments if the proof shows to its satisfaction that the rates under which the shipments moved were excessive and unreasonable, for the law declares every unjust and unreasonable charge to be unlawful. The Commission also has authority to measure the shipper's damages upon the basis of such lower rate as it may find from the evidence would have been a reasonable and just charge for the service rendered. The sections referred to not only give the Commission a procedure for trying such issues, but afford to shippers a process in the courts for enforcing any such order of the Commission.

The question of the Commission's authority to order reparation in such cases seems to be settled conclusively in **Texas & Pacific Ry. Co. vs. Abilene Cotton Oil Co.**, 204 U. S. 426. It is there said (page 442):

"Although an established schedule of rates may have been altered by a carrier voluntarily or as the result of the enforcement of an order of the Commission to desist from violating the law, rendered in accordance with the provisions of the statute, it may not be doubted that the power of the Commission would nevertheless extend to hearing legal complaints and of awarding reparation to individuals for wrongs unlawfully suffered from the application of the unreasonable schedule during the period when such schedules was in force."

Arkansas Fuel Co. vs. C. M. & St. P. Ry. Co., 16 I. C. C. Rep. 95, 96, 97.

§ 4. Right of Carrier to Initiate Rates.

Under the law carriers must initiate rates since the Interstate Commerce Commission is without power to legislatively prescribe a schedule of rates or to petition the

courts for a mandamus to require observance by the carriers of such a prescribed schedule. The Commission, so long as this right is not abused, is not justified in penalizing the carriers, but the mandate of the statute, that rates shall be just and reasonable, attaches a presumption of reasonableness to the rates initiated by the carrier, and the power of the Commission, including its extension under the amended fifteenth section, is an enabling authority to test the compliance of the carrier with the mandate of the Act.

Foster Lumber Co. vs. A. T. & S. F. Ry. Co., 15 I. C. C. Rep. 56.

Banner Milling Co. vs. N. Y. C. & H. R. R. Co., 14 I. C. C. Rep. 398.

Nat'l Hay Assn. vs. L. S. & M. S. R. R. Co., 9 I. C. C. Rep. 264.

§ 5. Relative Rates—License of Comparison.

The impracticability of determining the reasonableness of a rate generally from a consideration of the rate—*per se*—"in and of itself," leads all authorities in these matters to agree that one of the most satisfactory tests of the reasonableness of the rates of one carrier is a comparison with the rates of other carriers operating in the same territory under the same general conditions.

Chamber of Commerce of Milwaukee vs. Chicago, etc., Ry. Co., 15 I. C. C. Rep. 460, 466.

But such comparison may not be of material assistance in determining the reasonableness of transportation charges, because before it may be concluded that a given rate is too high, because it is higher than some other rate named, it must be known that the rate selected as the standard of comparison is itself a reasonable and fair one. This can by no means be affirmed from the mere fact that it is found in effect, or even that it has continued in effect for a considerable length of time. It has probative force

in a presumption of reasonableness merely, but all the facts and conditions affecting the standard of comparison as well as the compared rate must be considered.

- Darling & Co. vs. B. & O. R. R. Co., 15 I. C. C. Rep. 79, 83.
 I. C. C. vs. W. & A. R. R. Co., 88 Fed. Rep. 186, 193.
 Brewer vs. Cent. of Ga. Ry. Co., 84 Fed. Rep. 258, 268.
 I. C. C. vs. E. Tenn., etc., Ry. Co., 85 Fed. Rep. 107.
 Kansas City Cotton Mills vs. Chicago, etc., P. Ry. Co., 14 I. C. C. Rep. 468, 472.
 Frye & Bruhn vs. Nor. Pac. Ry. Co., 13 I. C. C. Rep. 501, 508.
 Johnston vs. St. L., etc., R. R. Co., 12 I. C. C. Rep. 73, 77.
 Davenport vs. S. R. Co., 11 I. C. C. Rep. 650, 657.

The question of the reasonableness of rates, even in and of themselves, is in a certain sense a relative one. Aside from the mathematical approximations testing the remunerativeness of rates attacked as inherently unreasonable, comparison may be properly indulged with accepted rates, under established similarity of conditions of transportation. Elsewhere for a similar service is almost always pertinent, and sometimes a necessity. Freight rates must be almost invariably considered in relation to and in connection with other rates.

The value, however, of the comparison is always dependent upon the degree of similarity of circumstances and conditions surrounding the transportation service for which the challenged rates are charged and the rates imposed which are selected as a criterion. Thus, it is obvious that it would be manifestly unfair and productive of no helpful results, to compare non-competitive rates with competitive rates, or to use a short line rate to test the reasonableness of a higher rate applying via a more circuitous route. Very little importance can be attached to these comparisons when made with rates in different sections of the country, unless unquestioned similarity of conditions of transportation can be established.

- Kansas City Cotton Mills vs. Chicago, etc., P. Ry. Co., 14 I. C. C. Rep. 468, 472.

Frye & Bruhn vs. Nor. Pac. Ry. Co., 13 I. C. C. Rep. 501, 508.
Darling & Co. vs. B. & O. R. R. Co., 15 I. C. C. Rep. 79, 83.
Ryland & Brooks Lumber Company vs. C. & O. Ry. Co., 21
I. C. C. Rep. 520, 521; also Simon Cook Co. vs. W. R. R.
Co., 21 I. C. C. Rep. 563, 564, holding that the rate of one
competing line is not necessarily a measure of the reason-
ableness of a rate on another road.

It is a well-settled principle that rates must not only be reasonable in and of themselves, but they must also be relatively reasonable. The duty imposed by law is to give equal treatment to all shippers, and this includes the right to reach competitive markets on relatively equal terms. Carriers are not required by law, and could not in justice be required, to equalize natural disadvantages, such as location, cost of production and the like, but they may not in any manner whatsoever unduly prefer one set of shippers entitled to equal treatment over another, or one locality over another. Comparison of the environment of rates is essential to this principle.

Elk Cement & Lime Co. vs. B. & O. R. R. Co. et al., 22 I. C. C. Rep. 84, 88.

The Commission holds that where general rate adjustments in and between large territories, which contemplate substantial justice between all shippers generally, result in individual instances of disproportionate inequality, they fail in their purpose to that extent, and their strict observance in such cases upon no other ground than the arbitrary theory of their existence, should yield to the extent necessary to prevent gross injustice, just as many other general rules are necessarily subject to exceptions. The Commission would, therefore, consider such rates without regard to any imaginary geographical line of demarcation between different methods of tariff construction and upon no definite rule except relative justice between two given points of alleged disproportionate inequality.

Alpha Portland Cement Co. vs. B. & O. R. R. Co. et al., 22 I. C. C. Rep. 446, 449.

IN **Kosmos Portland Cement Co. vs. I. C. R. R. Co.**, 37 I. C. C. Rep. 449, 452, the Commission said that a general rate adjustment, however fair for the major portion of the traffic moving thereunder, does not justify an unreasonable difference in rates between a producing point on the south bank and one a few miles north of a river.

Nor may a scale of rates which has been in existence for many years and is the result of strongly competitive influence, be made the basis of comparison with rates established under substantially dissimilar conditions.

So, the carriers can not rely generally upon adherence to a comprehensive rate adjustment and at the same time ignore important incidents and underlying bases of such adjustment.

Traffic Bureau of Knoxville, Tenn., vs. C. N. O. & T. P. Ry. Co., 37 I. C. C. Rep. 687, 688.

Lettuce from Texas Points, 36 I. C. C. Rep. 511, 513.

Re Advances on Milk, 23 I. C. C. Rep. 500, 503.

Ashgrove, etc., Cement Co. vs. A. T. & S. Ry. Co., 23 I. C. C. Rep. 519, 525.

Alpha Portland Cement Co. vs. B. & O. R. R. Co., 22 I. C. C. Rep. 446, 450.

Memphis Frt. Bur. vs. St. L., etc., Ry. Co., 22 I. C. C. Rep. 548, 555.

So. Atlantic Waste Co. vs. So. Ry. Co., 22 I. C. C. Rep. 293, 296.

Lindsay Bros. vs. L. S. & M. S. Ry. Co., 22 I. C. C. Rep. 516, 517.

Victor Mfg. Co. vs. So. Ry. Co., 21 I. C. C. Rep. 222, 228.

Ore. & Wash. Lumber Mfrs. Assn. vs. So. Pac. Co., 21 I. C. C. Rep. 389, 392.

Re Investigation and Suspension Dockets 38 and 38-A, 21 I. C. C. Rep. 591, 594.

Acme Cement Plaster Co. vs. L. S. & M. S. Ry. Co., 17 I. C. C. Rep. 30.

Board of Trade, etc., vs. N. & W. Ry. Co., 16 I. C. C. Rep. 12.

Mich. Buggy Co. vs. G. R. & I. Ry. Co., 15 I. C. C. Rep. 297.

Omaha Cooperage Co. vs. N. C. & St. L. Ry. Co., 12 I. C. C. Rep. 250.

Morrell vs. U. P. R. R. Co., 6 I. C. C. Rep. 121, 4 I. C. C. Rep. 469.

Cannon vs. M. & O. R. R. Co., 11 I. C. C. Rep. 537.

Colo. Fuel & Iron Co. vs. S. P. Co., 6 I. C. C. Rep. 488.

- McMorran vs. G. T. Ry. Co. 3 I. C. C. Rep. 252, 2 I. C. Rep. 604.
Parsons vs. C. & N. W. Ry. Co., 167 U. S. 447.
Parsons vs. C. & N. W. Ry. Co., 63 Fed. Rep. 903.
T. & P. Ry. Co. vs. I. C. C., 162 U. S. 197.

§ 6. Comparison of Rates on Different Lines.

Freight rates are controlled by various and varying conditions, and rates established in one section of the country furnish no reliable standard by which to measure the reasonableness of rates in another section where the conditions prevailing are dissimilar. The comparison would be of evidentiary bearing, however, if substantial degree of similarity of conditions of transportation may be established.

See also:

- Acme Cement Plaster Co. vs. L. S. & M. S. Ry. Co., 17 I. C. C. R. 30.

Varying conditions existing on different lines must of necessity justify differences in rates for hauls of the same distance. The real question in any complaint is the reasonableness of the particular rate on the particular line between the particular points in question. In testing such a rate the rates on the same or adjacent lines in the immediate territory where the same conditions exist are of such greater significance and afford a much more accurate basis for action.

See also:

- Dallas Frt. Bureau vs. G. C. & S. F. Ry. Co., 12 I. C. C. Rep. 223, 226.
Rhineland Paper Co. vs. Nor. Pac. Ry. Co., 13 I. C. C. R. 633, 635.

In this latter case, the Commission suggested that while the revenue per ton mile over other routes on other lines

and to other destinations is often suggestive in arriving at a proper estimate of the reasonableness of a rate over a route complained of, it is by no means conclusive. It should be borne in mind in this regard that the per ton per mile unit of comparison is no longer regarded as indicative of the compensatory nature of a rate in as accurate a degree as the per car mile or per car unit.

See also:

Re Advances on Milk, 23 I. C. C. R. 500, 503.

§ 7. Comparison of Rates on Different Branches of Same Line.

Comparison may be made to determine reasonableness of rates with rates on different branches or lines of the same carrier, but the value of such a comparison is dependent in all cases upon the degree of similarity of circumstances and conditions of the transportation, for which the rates compared are charged, which can be established.

Fr. Bu. of Cincinnati vs. C. N. O. & T. R. R. Co., 6 I. C. C. R. 195, 4 I. C. R. 592.

See also:

Morrell vs. Un. Pac. R. Co., 6 I. C. C. Rep. 121, 4 I. C. Rep. 469.

§ 8. Comparison with Division of Joint Rate.

Although a shipper or consignee has no direct interest in the way a joint rate is divided between the carriers, nor in the amount of the division received by each carrier, he is entitled, nevertheless, to inquire into such division when he complains that the joint rate is unlawful, for the amount received by the different carriers may be significant upon the reasonableness of the aggregate charge.

And when an unlawful rate results from some arbitrary share or division exacted by one of the carriers, the Commission will find the facts and state its conclusion with respect to such share or division.

Warren-Ehret Co. vs. C. R. R. of N. J., 8 I. C. C. Rep. 598.
Charlotte Shippers' Assn. vs. S. Ry. Co., 11 I. C. C. R. 108,
holding that if the through rate is not unreasonable in the aggregate, the law and the public are not affected by the distribution of the component parts of the rate among the carriers forming the through line.

The Commission has repeatedly held that under ordinary circumstances shippers are not concerned with the division of the joint through rate upon which the carriers have agreed among themselves. In every case the joint through rate on any commodity between two given points is an entirety and is the only rate that lawfully can be applied. If the application of such joint through rate results in injustice or is unreasonable, or if undue prejudice or disadvantage is created by such rate, then complaint concerning such joint rate may be filed with the Commission and it may be proper to consider the divisions of such rate in order to determine its reasonableness. Moreover, whenever injury or damage had been suffered by reason of the carriers assessing such joint rate, the person injured may be entitled under the Act to reparation or damages; but there is no authority for a complainant to attack the divisions of a joint through rate, alleging illegality under the Act in the joint through rate itself.

Copper Queen Consolidated Mining Co. vs. B. & O. R. R. Co.,
18 I. C. C. Rep. 154, 156.

In an earlier case the Commission held that while a division of through rate long accepted by a carrier may often be pertinent evidence of a compensatory basis, it is not a sound final test of the reasonableness of the through

rate itself. The comparison thus referred to is of value simply in its evidentiary bearing upon the effect of the component parts of the rate upon the aggregate charge.

See also:

- Bulte Milling Co. vs. C. & A. R. R. Co., 15 I. C. C. Rep. 351.
- Boston Chamber of Commerce vs. L. S. & M. S. Ry. Co., 1 I. C. C. Rep. 436, 453.
- Charlotte Shippers' Assn. vs. S. Ry. Co., 11 I. C. C. Rep. 108, 128.
- Lindsay Bros. vs. L. S. & M. S. Ry. Co., 22 I. C. C. Rep. 516, 517.
- Stiritz vs. N. O. M. & C. R. R. Co., 22 I. C. C. Rep. 578, 581.

§ 9. Comparison with Water-Compelled Rates.

It is undisputed that rail carriers when in competition with water carriers may reduce their rates to meet the water charges. Upon a remunerative basis there can be no comparison of rail and water rates. The water carrier, free from any cost whatever for its right of way and the maintenance of its highway, may make rates which are compensatory to it but which are far below the remunerative level of rail rates. The mere existence of a navigable waterway is a potential factor of competition to a rail carrier, and it is essential that the rail carrier resort to an impulsion of traffic by the lowering of its rates. There can, therefore, be no justifiable comparison of the rates of a carrier free from water competition with the rates of a carrier adjusted to meet the formidable competition which water transportation sets up.

- Bulte Milling Co. vs. C. & A. R. R. Co., 15 I. C. C. Rep. 351 359.

See also:

- Annual Report of I. C. C. for 1889.
- Shelbyville Business Men's Assn. vs. L. & N. R. R. Co., 37 I. C. C. Rep. 675, 678.
- Traffic Bureau of Knoxville, Tenn., vs. C. N. O. & T. P. Ry. Co., 37 I. C. C. Rep. 687, 691.

§ 10. Comparison with Rates Fixed by State Authority.

There are many reasons why state and interstate rates should be established in harmony with one another. It is especially unfortunate when the sum of state locals form a less combination than the through interstate rates. Railway rates depend on local conditions and necessities with which state commissions are often better acquainted than a national commission possibly can be. When, therefore, the Commission is asked to examine the reasonableness of an interstate rate, similar rates established by state authority in that territory must have great influence, especially where they have been long acquiesced in by the carriers. It is impossible not to be strongly influenced toward the view that such rates are just and reasonable.

Still state rates have no binding force upon the Commission. They are standards of comparison of greater or less value, according as they appear to be just and reasonable. The Commission has several times refused to recognize the reasonableness of state rates, even when those rates were directly in issue, holding that a through interstate rate might properly be in excess of the sum of the state locals.

Savannah Bu. of Frt. & Transp. vs. C. & S. R. R. Co., 7 I. C. C. Rep. 601.

Artz vs. S. A. L. R. R. Co., 11 I. C. C. Rep. 458.

Brabham vs. A. C. L. R. R. Co., 11 I. C. C. R. 464.

Corn Belt Meat Producers' Assn. vs. C. B. & Q. R. R. Co., 14 I. C. C. R. 376.

Willman & Co. vs. St. L., etc., R. Co., 22 I. C. C. Rep. 405.

Gamble-Robinson Com. Co. vs. St. L., etc., R. Co., 22 I. C. C. Rep. 138, 140.

Upon general principles of comity, the action of a state commission in fixing a rate on state traffic, the Commission holds, should be treated with all due respect, but the Commission does not consider itself bound to accept a state-made rate as a necessary measure of an interstate

rate; nor is a railroad bound to accept a schedule of rates established by state authority as the measure of its interstate rates. The Commission gives no further weight to rates established by a state commission than it affords to rates voluntarily established by the carriers.

Re Investigation of Rates on Meats, 22 I. C. C. Rep. 160, 164.
Saunders & Co. vs. So. Ex. Co., 18 I. C. C. R. 415.

Re Freight Rates between Memphis and Arkansas Points, 11 I. C. C. Rep. 180.
Hope Cotton Oil Co. vs. T. & P. Ry. Co., 12 I. C. C. Rep. 265.

See also:

R. R. Com. of Wis. vs. C. & M. V. R. Co., 16 I. C. C. Rep. 85.
Bartles Oil Co. vs. C. M. & St. P. Ry. Co., 17 I. C. C. Rep. 146.

Marshall Oil Co. vs. C. & N. W. Ry. Co., 14 I. C. C. Rep. 210.
Paola Refining Co. vs. M. K. & T. R. Co., 15 I. C. C. Rep. 29.
Cobb vs. N. P. Ry. Co., 20 I. C. C. Rep. 100, 102, 103.

Conceding that state-made rates are valuable for comparative purposes, the Commission has held that the maintenance of lower intrastate rates, over which the carrier has no control, does not amount to unlawful discrimination.

Baxter & Co. vs. G. S. & F. Ry. Co., 21 I. C. C. Rep. 647, 648.

Nor will the Commission withhold proper action in an interstate situation because it is anticipated that some opposing or retaliatory action will be taken by a state body.

Re Investigation and Suspension Docket 24, 21 I. C. C. Rep. 546, 552.

Where a state rate is under protest, the Commission will not consider it available for comparative purposes.

Gamble-Robinson Com. Co. vs. St. L., etc., R. Co., 22 I. C. C. Rep. 138, 140.
Memphis Frt. Bu. vs. St. L., etc., R. Co., 22 I. C. C. Rep. 548, 555.

It is not a controlling point that where jobbing centers are situated near state lines, the advance of the interstate rates and the retention of a continued lower charge on state shipments will inevitably result in a discrimination against the former. It is ancillary to and should be considered in connection with the rule that carriers may not haul a particular class of traffic, or traffic for a particular community, at less than the cost of the service and recoup themselves from the charges levied against other traffic.

See:

Investigation and Suspension Dockets 48 to 48-E, 22 I. C. C. Rep. 328, 335.

Compare:

Shreveport Case *Houston E. & W. Texas Ry. Co. vs. U. S.*, 234 U. S. 342.

Minnesota Rate Case, 230 U. S. 352.

So. Dakota Express Case, 39 I. C. C. Rep. 703.

Iowa-Dakota Grain Co. vs. I. C. R. R. Co., 40 I. C. C. Rep. 73.

Missouri River-Nebraska Cases, 40 I. C. C. Rep. 201.

The Commission has always given due consideration and weight to state-made rates, but under the duty imposed upon it by law, the Commission must determine the reasonableness of interstate rates from all of the pertinent facts and can not accept rates prescribed for intrastate transportation as conclusive.

Holmes & Hallowell Co. vs. G. N. Ry. Co., 37 I. C. C. Rep. 627, 631.

In the *Holmes & Hallowell Co. Case*, *supra*, in referring to the Minnesota rate legislation, the Commission said, at page 631:

"In the earlier of these cases discrimination was the principal basis of the complaints. Reliance was placed by complainants wholly upon a comparison

of the rates under attack with the Minnesota intrastate rates. The circumstances and conditions of transportation were alleged to be substantially the same in this general territory whether the movements were interstate or intrastate, and the fact that refunds had been paid upon the latter was urged as constituting an unjust discrimination against interstate shippers. The interstate rates were likewise alleged to be unreasonable but this also was founded upon a comparison with the Minnesota rates. These earlier cases had been submitted upon the records, briefs, and oral argument before the Supreme Court announced its decision in the *Shreveport case, Houston E. & W. Texas Railway vs. United States*, 234 U. S., 342. Thereafter the complainants in certain of the cases asked that they be reopened for further testimony. Leave was granted and the cases were reheard.

"Upon the rehearing of these earlier cases and upon the hearings of the later cases a series of rate comparisons, drawn from interstate rates applicable to other movements, was offered in evidence for the purpose of showing that the rates here attacked are unreasonable. These comparisons, which relate chiefly to rates on coal, are largely the same in the several cases here involved. They are pressed to our attention upon different theories. It is urged, for example, that they affirmatively show the Minnesota intrastate rates to be reasonable and that these intrastate rates therefore show the interstate rates to be unreasonable. In whatever from the matter is put, it is clear that the fundamental basis of these complaints is the comparison of the interstate rates with those prescribed by the state of Minnesota.

"At the outset some general references may properly be made to the readjustments in rates for interstate transportation in the territory here involved which have resulted from the Minnesota rate schedules. The explanation offered by the carriers is this: The Northern Pacific, as to its intrastate line from Du-

luth, is subject to the state jurisdiction and after the decision of the Supreme Court in the **Minnesota Rate Cases**, *supra*, was compelled to make effective from Duluth the rates prescribed by state authority. As a practical matter, a different basis could not be applied for the movement over its interstate line from Duluth, and therefore the state rates were published for application to this line also. Although the line of the Great Northern Railway is interstate from Duluth to all points in Minnesota, that carrier, under the force of competition, met these Northern Pacific rates at certain points in Minnesota, and the rates thus made were established at certain intermediate points of destination under the requirements of the long-and-short-haul clause of the fourth section. The competitive rates thus made by the Great Northern are the same as the intrastate rates for the Northern Pacific mileage. Superior is intermediate to Duluth on the line of the Great Northern, and to avoid a departure from the fourth section this carrier established these competitive rates from that point. This compelled the Northern Pacific to establish the state rates from Superior to these competitive points. So also the Northern Pacific was forced to establish the state basis of rates from Superior to noncompetitive points, since these rates were in effect by its interstate line from Duluth, which runs through Superior. Thus it appears that the state basis of class and commodity rates is now applicable via the Northern Pacific from both Duluth and Superior, while the Great Northern has not established these rates from either point since the injunction period except where compelled by competition and the fourth section. Certain readjustments of substantially the same character have been made by other interstate carriers serving the head of the lakes. The Minnesota rate legislation has, therefore, brought about reductions from the head of the lakes to points in Minnesota, both by intrastate and interstate lines, but has also had the effect of making certain in-

equalities upon these movements which did not formerly exist."

See also:

- Iowa-Dakota Grain Co. vs. I. C. R. R. Co., 40 I. C. C. Rep. 73, 77.
 Traffic Bureau of the Sioux City Coml. Club vs. American Express Co., 39 I. C. C. Rep. 703, 724.
 Western Passenger Fares, 37 I. C. C. Rep. 1, 41, 42.
 1915 Western Rate Advance Case, Part II, 37 I. C. C. Rep. 114, 163.
 Lumber from Michigan Points, 36 I. C. C. Rep. 184, 186, 189.
 Oklahoma Traffic Assn. vs. A. & S. Ry. Co., 36 I. C. C. Rep. 329, 347.
 Merrill & Bros. vs. I. C. R. R. Co., 36 I. C. C. Rep. 523, 524.
 Morris & Co. vs. U. P. R. R. Co., 36 I. C. C. Rep. 540, 544.
 Oklahoma Cottonseed Crushers' Assn. vs. M. K. & T. Ry. Co., 35 I. C. C. Rep. 94, 103.
 Coal & Coke Rates in the Southeast, 35 I. C. C. Rep. 187, 197.
 Regulations as to Storage of Dairy Products, 35 I. C. C. Rep. 469, 473.
 The Twin Cities Cases, 33 I. C. C. Rep. 577, 583.
 Underwood Veneer Co. vs. A. A. R. R. Co., 32 I. C. C. Rep. 265, 268.
 Freight Rates from Minnesota Points, 32 I. C. C. Rep. 361, 363.
 Baltimore Switching Charges, 32 I. C. C. Rep. 376, 379.
 Beatrice Coml. Club vs. C. B. & Q. R. R. Co., 31 I. C. C. Rep. 173, 179, 181.
 Carroll, Brough & Robinson vs. A. T. & S. F. Ry. Co., 31 I. C. C. Rep. 466, 470.
 Corp. Comm. of Okla. vs. A. T. & S. F. Ry. Co., 31 I. C. C. Rep. 532, 541.
 Rates on Beer and Other Malt Products, 31 I. C. C. Rep. 544, 545.
 Rhinelander Paper Co. vs. M. St. P. & S. S. M. Ry. Co., 31 I. C. C. Rep. 555, 558.
 Colonial Salt Co. vs. C. B. & Q. R. R. Co., 31 I. C. C. Rep. 559, 567, 570.
 Merchants & Mfrs. Assn. vs. C. C. R. R. Co., 30 I. C. C. Rep. 29, 30.
 Trier vs. C. St. P. M. & O. Ry. Co., 30 I. C. C. Rep. 352, 354, 355.
 Minneapolis Civic & Comm. Assn. vs. C. M. & St. P. Ry. Co., 30 I. C. C. Rep. 663, 665.
 Trier vs. C. St. P. M. & O. Ry. Co., 30 I. C. C. Rep. 707, 709.

In **Trier vs. C. St. P. M. & O. Ry. Co.**, 30 I. C. C. Rep. 707, it was said, at page 709:

"On principle it would seem that the reasonable-

ness *per se* of an interstate rate should be independently determined. To the extent that state-established rates are permitted either conclusively or presumptively to determine the reasonableness of rates for interstate journeys, to that extent must this Commission, as a federal tribunal, be embarrassed by the anomalous situations arising from conflicts between state and federal jurisdictions. We are inclined to doubt the propriety and legality of permitting the assumption that a passenger who buys a through ticket for an interstate journey pays a charge which consists of a combination of a number of state charges, or of an interstate charge plus an intrastate charge. It would seem that an interstate journey should be viewed in its entirety, and that a complainant should not be permitted, except so far as the fourth section is applicable, to divide the interstate rate into as many parts as the number of states through which the interstate journey runs, merely for the purpose of ascertaining whether each separate intrastate leg of an interstate journey carries a rate which conforms to the rate prescribed for intrastate trips by the state in which that leg lies. In other words, an interstate rate, except for fourth-section purposes, should be deemed indivisible in gauging its justice and reasonableness."

In the **Beer and Malt Products Case**, 31 I. C. C. Rep. 544, in speaking of the Minnesota statute, the Commission said, at page 544:

"It was shown that, should this intrastate rate be reduced to the interstate rate, the carriers would thereby, under the provisions of the law as construed, make this reduced rate the measure of all other rates on beer for the same distance on their lines throughout of the state of Minnesota. Unquestionably the law of Minnesota presents a situation to the carriers which makes it necessary for them either to adjust some interstate rates to the mileage rates prescribed by that law, to leave their intrastate and interstate

rates out of line, or to suffer material reductions below the intrastate rates fixed thereunder. While we may consider this fact, "Congress does not directly or indirectly interfere with local rates by adopting their sum as the interstate rate", **L. & N. R. R. Co. vs. Eubank**, 184 U. S., 27, 42, and we can not say that merely because a higher intrastate rate exists that an increase of an interstate rate to meet the state-made rate is justified, even though the transportation conditions as to distance and territory are similar. Nor do the facts here presented require that we consider the application of the decision of the Supreme Court in the **Shreveport case, H. E. & W. T. Ry. Co. vs. United States**, 234 U. S., 342. This conclusion makes it unnecessary for us to more particularly describe the Minnesota statute and the situation resulting therefrom."

Referring to the same facts in **Freight Rates from Minnesota Points**, 32 I. C. C. Rep. 361, the Commission said, at page 363:

"The same principle applies to the matter now before us, and we need not consider further the Minnesota statute except in so far as the rates established under it may be regarded as evidence tending to support the claim that the rates under suspension are just and reasonable. It is well settled that state-made rates may be considered in determining the reasonableness of interstate rates in the same general territory."

Citing:

Minneapolis Civic & Commerce Assn. vs. C. M. & St. P. Ry. Co., 30 I. C. C. Rep. 663.
Pulp & Paper Mfrs. Traffic Assn. vs. C. M. & St. P. Ry. Co., 27 I. C. C. Rep. 83.

In **Marshall Oil Company vs. C. & N. W. Ry. Co.**, 14

I. C. C. Rep. 210, the Commission's attitude was unmistakably set forth:

"The decisions of the several state railroad commissions are worthy of consideration, but this Commission is not justified under the law in accepting a comparison of lower intrastate rates prescribed by the state authorities with those applying on interstate traffic as conclusive of the unreasonableness of the interstate rates."

It is said that the effect of the order entered by the Commission in the South Dakota Express Case is to "blow up" the entire state structure of express rates because of their discriminatory effect upon the interstate express rates.

Traffic Bureau, etc., vs. Am. Ex. Co., 39 I. C. C. Rep. 703, 724.

The same attitude of the Commission respecting comparison with state-made rates in the determination of unjust discrimination against interstate rates, was clearly apparent in the noteworthy Shreveport, Memphis, St. Louis Business Men's League, and South Dakota Express Rate cases.

§ 11. Comparison with Rates Established by Interstate Commerce Commission.

When comparison is made between challenged rates and rates established pursuant to an order of the Commission, the latter are to be regarded in the same light, and given the same weight, as rates made by the carriers without an order of the Commission.

Davenport vs. So. Ry., 11 I. C. C. R. 650, 657.

§ 12. Illustrating Standards of Comparison by Interstate Commerce Commission.

The general level of rates in Central Freight Association Territory east of the Mississippi River is very much

lower than that prevailing in territory west of that river. For example, rates in cents per 100 pounds upon the numbered classes by the Santa Fe from Coffeyville, Kansas, to Fort Madison, Iowa, compare with corresponding rates from Columbus, Ohio, to Fort Madison, as follows:

Coffeyville to Fort Madison.					
Class 1	2	3	4	5
	<hr/>	<hr/>	<hr/>	<hr/>	<hr/>
Rate101	83	69½	52	43

Columbus to Fort Madison.						
Class.	1	2	3	4	5	6
	<hr/>	<hr/>	<hr/>	<hr/>	<hr/>	<hr/>
Rate..	59	51½	41	29½	24½	20

In the Sunflower Glass Case, the Commission declined to reduce the western rates because the difference in the class rates above shown fairly represented the difference in the general level of rates.

Sunflower Glass Co. vs. Mo. Pac. R. Co., 22 I. C. C. Rep. 391, 392.

The Commission has also held that because of this difference in rate levels, the difference in transportation conditions may justify a lower commodity rate, mile for mile, east than west of the Mississippi River.

Sunflower Glass Co. vs. Mo. Pac. R. Co., 22 I. C. C. Rep. 391, 392.

Bd. of R. R. Comrs. of State of Kansas vs. Atchison, etc., R. Co., 22 I. C. C. Rep. 407, 415.

Generally speaking, articles transported in Southern Classification Territory pay higher rates than when transported for a like distance under Official Classification ratings. There are exceptions to this rule, however; and

as a generality, there is no such difference in the level of the rates between Official Classification Territory and Southern Classification Territory as there is between Official Classification Territory and the territory west of the Mississippi River.

See:

Rau vs. P. R. R. Co., 12 I. C. C. Rep. 199, 201.

In **Dallas Freight Bureau vs. Gulf, Col. & S. F. Ry. Co.**, 12 I. C. C. Rep. 223, 225, it was said:

"While the revenue per ton per mile over other routes on other lines and to other destinations is often suggestive in arriving at a proper estimate of the reasonableness of a rate over a route complained of, it is by no means conclusive. Varying conditions existing on different lines must of necessity justify differences in rates for hauls of the same distance. The real question in any such complaint is the reasonableness of a particular rate on the particular line between the particular points in question. In testing such a rate the rates on the same or adjacent lines in the immediate territory where the same conditions exist are of much greater significance and afford a much more accurate basis for the Commission's action."

Comparison of rates is in recognition of a long established principle of determining relative values of property, and, with necessary qualification, is the customary method of judging the reasonableness of rates.

Cement to Long Island Points, 37 I. C. C. Rep. 694, 695.

Rates and Rules on Shipments of Packing House Products, 36 I. C. C. Rep. 62, 67.

The Iron and Steel Cases, 36 I. C. C. Rep. 86, 94.

Carey Mfg. Co. vs. G. T. Ry. Co., 36 I. C. C. Rep. 203, 204, 206.

Classification of Chairs, 36 I. C. C. Rep. 243, 244.

Peppard Seed Co. vs. A. T. & S. F. Ry. Co., 36 I. C. C. Rep. 311, 314.

Oklahoma Traffic Asso. vs. A. & S. Ry. Co., 36 I. C. C. Rep. 329, 343.

- Prest-O-Lite Co. vs. B. & A. R. R. Co., 36 I. C. C. Rep. 545, 548.
 Eastern Live-Stock Case, 36 I. C. C. Rep. 675, 680, 697.
 Parfrey vs. Chicago, M. & St. P. Ry. Co., 20 I. C. C. Rep. 104.
 Delray Salt Co. vs. D. T. & I. Ry. Co., 18 I. C. C. Rep. 245.
 Snyder-Malone-Donahue Co. vs. Chicago, B. & Q. R. Co., 18 I. C. C. Rep. 498, 499.
 Pankey & Homes vs. Central New England Ry. Co., 18 I. C. C. Rep. 578.
 Clark & Co. vs. Buffalo & S. Ry. Co., 18 I. C. C. Rep. 380.
 Cannon vs. Mobile & O. R. Co., 11 I. C. C. Rep. 537, 543.
 Marten vs. Louisville & N. R. Co., 9 I. C. C. Rep. 581, 597.
 Morrell vs. Union Pacific R. Co., 6 I. C. C. Rep. 121, 4 I. C. C. Rep. 469.
 Freight Bureau of Cincinnati vs. C. N. O. & T. P. Ry. Co., 6 I. C. C. Rep. 195, 4 I. C. C. Rep. 592, 610, 611.
 Manufacturers' and Jobbers' Union vs. Minneapolis & St. L. R. Co., 4 I. C. C. Rep. 79, 3 I. C. C. Rep. 115.
 Lincoln Creamery Co. vs. Union Pac. R. Co., 5 I. C. C. Rep. 156, 3 I. C. C. Rep. 794.
 Re Tariffs of Transcontinental Lines, 2 I. C. C. Rep. 324, 2 I. C. C. Rep. 203.

§ 13. Adjudicated Rates—Maintaining Rate Reduced After Complaint is Filed.

On December 2, 1907, it was decided that when a rate is reduced after answer has been made and before hearing, the report disposing of the proceeding shall carry with it an order directing the defendant to maintain that rate as a maximum for not less than two years. On December 6 it was decided that orders in special reparation cases should include a clause providing that the new rate or regulation upon the basis of which reparation is granted should be maintained for a period of at least one year.

It has since been agreed that the one year in orders in special reparation cases and the two years so required in orders upon formal complaints shall run from the date of the order and not from the date when the reduced rate or new regulation became effective.

I. C. C. Confr. Rulings Bull. No. 6, Ruling No. 14. Apply this ruling as affected by modifications and additions to be found in Confr. Rulings Nos. 130, 200-a, and 200-c.

Compare:

P. & G. Distributing Co. vs. A. & V. Ry. Co., 40 I. C. C. Rep. 367, where finding in prior case disposed of issue in pending case.

(1) **Carrier May Withdraw Rate Condemned by Commission in Another Case.** A carrier withdrew a rate which the Commission had condemned in a previous case as unreasonably low. This amounted to an advance in the carrier's rate. The Commission declared: "To hold that defendant may not withdraw a rate found by the Commission to be unreasonably low, merely because that rate was voluntarily established in the first place, would amount to requiring unjust preference of complainant, and to setting aside the fundamental principle that rates must be uniform under similar conditions."

Fairmont Creamery Co. vs. C. B. & Q. R. R. Co., 22 I. C. C. Rep. 252, 254.

(2) **Reduction of Rate when Formal Complaint Against it is Pending.** If the rate is reduced after complaint is made and before hearing, to the sum demanded by the complainant, the order of the Commission disposing of the proceeding will require the maintenance of that rate as maximum for not less than two years.

I. C. C. Confr. Rulings, Bull. 6, Ruling No. 11 (see Rulings No. 14, 130, 200-a, and 200-c).

§ 14. Rate Advanced for Short Period with Return to Former Rate Raises Presumption of Unreasonableness of Advanced Rate.

In the absence of unusual circumstances or conditions, the advance of a rate for a short period, followed by the restoration and maintenance of the former rate, tends to raise a presumption of fact that the advanced rate was

unreasonable. While of evidentiary bearing, special facts or circumstances may modify the presumption.

Fairmont Creamery Co. vs. C. B. & Q. R. R. Co., 22 I. C. C. Rep. 252, 253.

(1) **Advance Justified when Effect is to Equalize Nearby Rates.** The Commission approved an advance in coal rates from mines in Illinois to Chicago as reasonable and justified by the fact that the advance was made to equalize the rates from other near-by mines, and that the advanced rate itself was not unreasonable.

Re Advances on Bituminous Coal, 22 I. C. C. Rep. 341.

(2) **When Advance in Carload Minimum Weight is not an Advance in Rate.** If an advance in the carload minimum weight is made which causes the shipper no difficulty in complying therewith, and places no additional burden upon him, such increased minimum weight will not operate as an increase in rate.

Re Transportation of Wool, Hides, and Pelts, 23 I. C. C. Rep. 151, 158.

§ 15. Agreement as to Rates; Validity and Effect of between Shipper and Carrier.

The Commission has no authority to approve or enforce a private agreement made between shippers and carriers concerning charges for transportation, nor is it bound by such an agreement when the reasonableness of such charges are challenged in the mode prescribed in the act. It follows *a fortiori* that the Commission will not undertake to interpret or construe an agreement nor to determine its legal effect, nor to say that a tariff shall be issued in compliance therewith. The force and effect of such agreements as fixing obligations between the parties there-

to are to be determined by the courts, but under its rules of practice such contracts may be regarded and used as evidence so far as pertinent to questions which the Commission may determine, and it is desirable that the facts be thus agreed upon whenever practicable. When the parties thereto agree upon a rate, the agreement may be regarded as an admission as between the parties executing it of strong evidentiary value that the rate agreed upon is reasonable, and such evidence will be considered by the Commission together with all other facts, circumstances, and conditions that may reasonably apply to the matters under investigation, keeping in view all interests involved, and its duty to establish just and reasonable rates available for all shippers alike without discrimination in favor of any particular shipper by reason of an agreement with the carrier.

On the other hand the Commission is expressly authorized and empowered to pass upon the reasonableness of a charge for transportation or the reasonableness of any regulation or practice affecting such charge, expressed in a tariff issued by any carrier subject to the provisions of the Act. The rates charged and collected must be in accordance with the tariff legally effective, whether in compliance with any private agreement with the shipper or not, and the Commission must therefore look to the provisions of the tariff to ascertain the rate that has been challenged or the reasonableness of any regulations or practices affecting such rates, and to determine and prescribe upon consideration of all the evidence what will be a reasonable charge to be thereafter observed and what regulation or practice is fair to be thereafter followed.

Where the language of a tariff is ambiguous in its specifications, and where there is a reasonable doubt as to its true import and meaning, the agreement may be examined

and treated as a medium of explanation of the tariff to remove the ambiguity.

Hood & Sons vs. Delaware & Hudson Company, 17 I. C. C. Rep. 15, 18.

§ 16. Bill of Lading.—Shipments Tendered Under Other Than Conditions of, Subject to Higher Rates.

The Commission has held, where the tariffs of a carrier provide higher rates on shipments tendered with other than a uniform bill of lading, that the tender of the shipment accompanied by other than a uniform bill of lading may not be taken by the carrier as evidence of the shipper's election to use the higher rate. It is the duty of the carrier to direct the shipper's attention to the fact that a lower rate is available under the uniform bill of lading.

A similar rule obtained in the case of released valuation clauses on bills of lading, it being the duty of the carrier to secure the shipper's signature to such a release on the bill of lading when it had reasonable notice of the shipper's desire to take advantage of the lower rate upon a released valuation. This was prior to the taking effect of the Cummins amendments, but is still an efficacious rule.

It follows, therefore, that, under proper conditions, a higher rate based on the carrier's assumption of the risk of insurer under other than the uniform bill of lading, and a lower rate based upon a lesser assumption of risk might be justified under the law, the reasonableness of such higher rates is not precluded thereby from attack.

I. C. C. Conf. Ruling Bull. No. 6, Ruling No. 160.
I. C. C. Conf. Ruling Bull. No. 6, Ruling No. 226.

At the time of the enactment of the Cummins Amendment it was most vigorously argued by shippers and their traffic representatives that the effect of the limita-

tion of liability prohibition would be to automatically, on the taking effect of the amendment, increase all rates in the United States 10 per cent, because of the conditioning of the use of bills of lading then in effect, which were included in the classification schedules of the carriers on file as tariffs with the Interstate Commerce Commission.

The Commission gave the following construction to the amendment in answering the query—"If no changes are made in the existing shipping contracts and rate schedules, will the higher rates provided therein automatically become lawfully applicable upon the date upon which the amendment takes effect?"

"It is to be remembered that the Cummins amendment is not a separate statute, but is an amendment to the act. It must, therefore, be construed as a part of, and in connection with other portions of, the act, and in such a way as to give effect to the whole statute. There does not seem to be any indication of legislative intent to change any provision of the act other than that part known as the Carmack amendment. The new amendment should, if possible, be so construed as to give full force to its clear purpose, without impairing the effect of any other provisions of the act. * * * *

"As we have seen, the Carmack amendment, adopted in 1906, provided that no contract, receipt, rule, or regulation should exempt the carrier from the liability thereby imposed. As has been said, no effort was made to change rates because of that amendment to the act. The classifications or rate schedules provide that unless the terms of certain bills of lading are accepted higher rates will apply. The terms of the bill of lading could be modified or changed to any extent without automatically changing any rate. Prior to 1913 many of the limitations contained in bills of lading or other shipping contracts were treated as if they did not exist, and it was

never suggested that the validity or invalidity of any such provision affected the rate.

"It is contrary to all canons of construction to hold that an act of Congress produces a result not intended by Congress unless the express language of the act compels such a construction. There is nothing in the expressed terms of this act or in the history of this legislation that shows any intent or purpose on the part of Congress to affect in any degree the existing rates charged by carriers for transporting property. The legislation is aimed at specified contracts and declares them to be unlawful. The lawful rates on file at this time, therefore, are the rates providing for the limited liability. The Cummins amendment, by making contracts limiting liability for loss caused by the carriers unlawful, does not destroy these rates, but they remain in effect and are lawfully applicable, for the 10 per cent increased rates are merely additional and can not stand in and of themselves.

"Applying correct rules of interpretation, the Cummins amendment does not automatically bring into effect the increased rates named in the classifications and tariff publications as applicable to shipments which are not made subject to the terms of the uniform or carrier's bill of lading."

The Cummins Amendment, 33 I. C. C. Rep. 682, 692, 693.

§ 17. Burden of Proof of Reasonableness of Rates.

See "Interstate Commerce Law," Part IV, "Practice and Procedure before Commission"—"Burden of Proof," post.

(1) **Carriers may not Benefit by another Carrier's meeting of Burden of Proof Requirement.** See "Interstate Commerce Law," Part IV, "Burden of Proof," post.

§ 18. Capitalization.

The government has permitted private capital to invest in the construction and operation of common carriers. such higher rates not precluded thereby from attack.

While it might have established their rates, it has left that to competitive forces. The public has for many years known the results of the operations of these carriers, and their securities have thereby acquired certain values upon the market. At these values enormous private investments have been made. Private investors have bought, not for speculative purposes, but as a legitimate and permanent investment, large amounts of the stocks of many of these carriers.

Now, the government having permitted this to be done, can not close its eyes to the fact that it has been done. Nor can the Commission be oblivious to the effect of its action upon the value of these investments, which have been made in good faith. "In this view the market value of these stocks and bonds for the last 10 years certainly," said the Commission, "and the effect which our action may have upon their market value for the future, must be considered. We can not, of course, allow such rates as will in all cases guarantee or perpetuate the prices at which these stocks have been bought, but in viewing the entire situation we should have that price in mind."

Advances in Rates—Eastern Case, 20 I. C. C. Rep. 243, 259, 389.
Advances in Rates—Western Case, 20 I. C. C. Rep. 307, 320, 335.

Watered stock may not be considered as an element in the determination of the reasonableness of rates.

City of Spokane vs. N. P. Ry. Co., 15 I. C. C. Rep. 376, 410.

See also:

1915 Western Rate Advance Case, 35 I. C. C. Rep. 497.
Five Per Cent Case, 31 I. C. C. Rep. 351, 406.

In establishing a parity of rates between Atlanta, Ga., and Birmingham, Ala., the population, wealth and capitalization of the two cities were compared, the complainant

in the case showing that Atlanta excels Birmingham in population and wealth, in bank clearings, capitalization, and deposits, in industrial and manufacturing operations, including the capitalization of plants, the value of the materials used, the value of the products, the number and compensation of employees, etc. The wholesale and jobbing business of Atlanta is more extensive than that of Birmingham, and Atlanta's geographical location is said to be more favorable to development along such lines than that of Birmingham.

In passing upon these facts, the Commission said:

"Facts of this character, however, can carry weight only to the extent to which a definite relation between them and freight rates can be shown. With respect to means of communication with surrounding territory, Atlanta is said to be on a footing of substantial equality with Birmingham, there being about the same number of lines radiating from one center as from the other."

Atlanta Freight Bureau vs. N. C. & St. L. Ry. Co., 29 I. C. C. Rep. 476, 480.

§ 19. Combination among Carriers when Rates are Product of.

In determining the reasonableness of a rate, the Commission should inquire into the circumstances under which the rate was made. Said the Commission:

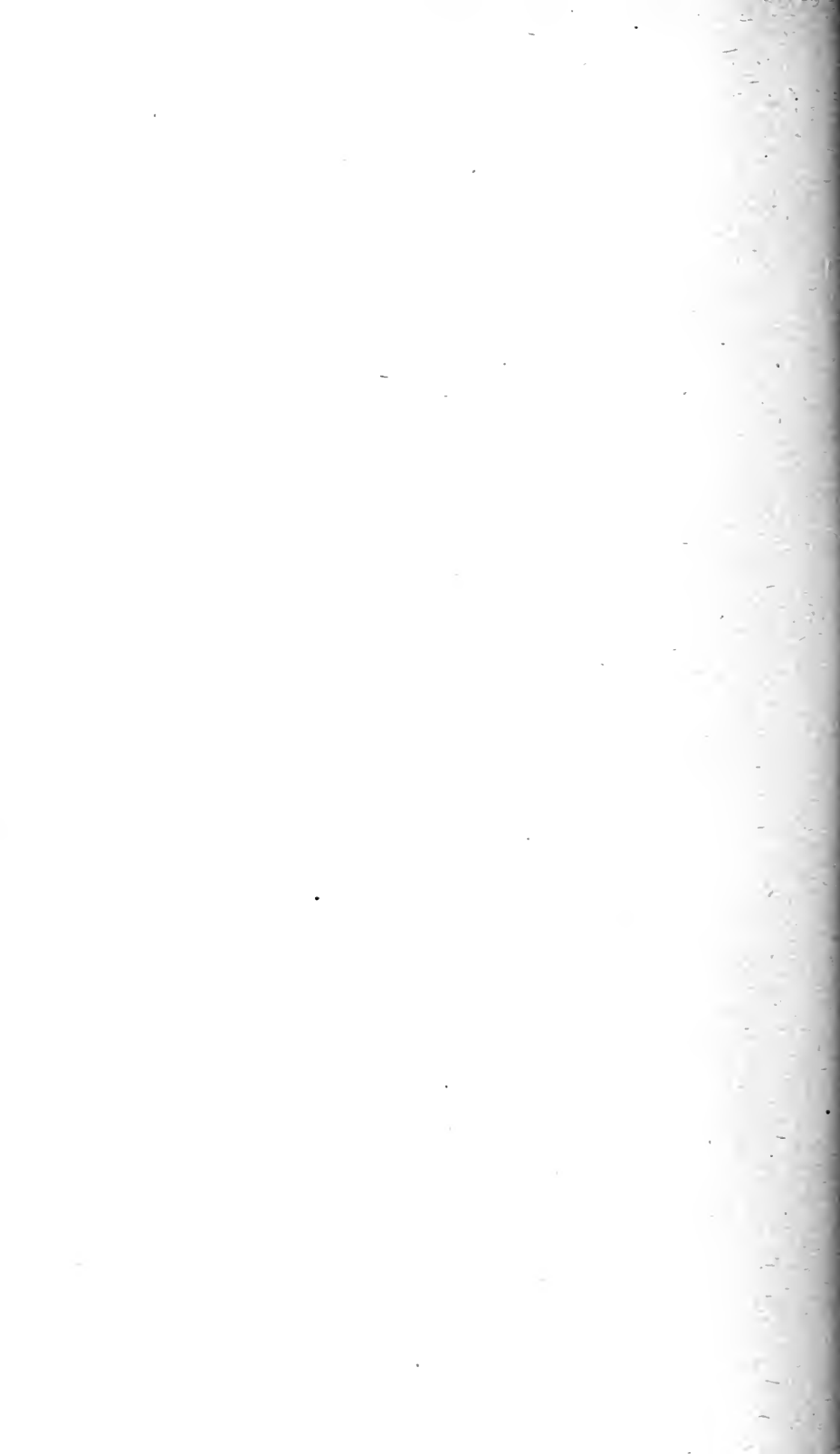
"If we find that it was not the product of free competition, but was the result of an agreement, this fact would rob the rate of the presumption of reasonableness which might otherwise attach, and should be considered by the Commission in determining whether the advance was justifiable; but if, after giving due weight to that and all other circumstances, we are still of the opinion that the rate in effect is

not too high, the mere fact that it was the product of an unlawful combination will not justify us in setting it aside. Such is the fair import of what we have said in several cases. **In Matters of Advances in Rates from St. Louis to Texas Points**, 11 I. C. C. R. 238; **Cattle Raisers' Association of Texas vs. Missouri, Kansas & Texas Railway Co., et al.**, 11 I. C. C. Rep. 296; **Tift vs. Southern Railway Co., et al.**, 10 I. C. C. Rep. 548; **Central Yellow Pine Association vs. Illinois Central Railroad Co., et al.**, 10 I. C. C. Rep. 505."

China & Japan Trading Company, Ltd., vs. Ga. R. R. Co.,
12 I. C. C. Rep. 236, 241.

See also:

I. C. C. vs. L. & N. R. Co., 190 U. S. 273, 47 L. Ed. 1047.
Warren Mfg. Co. vs. So. Ry. Co., 12 I. C. C. Rep. 381, holding that an agreement between carriers to increase rates is not conclusive that the increased rates are unreasonable. (Followed in 12 I. C. C. Rep. 451, 15 I. C. C. Rep. 453, and 16 I. C. C. Rep. 323.)



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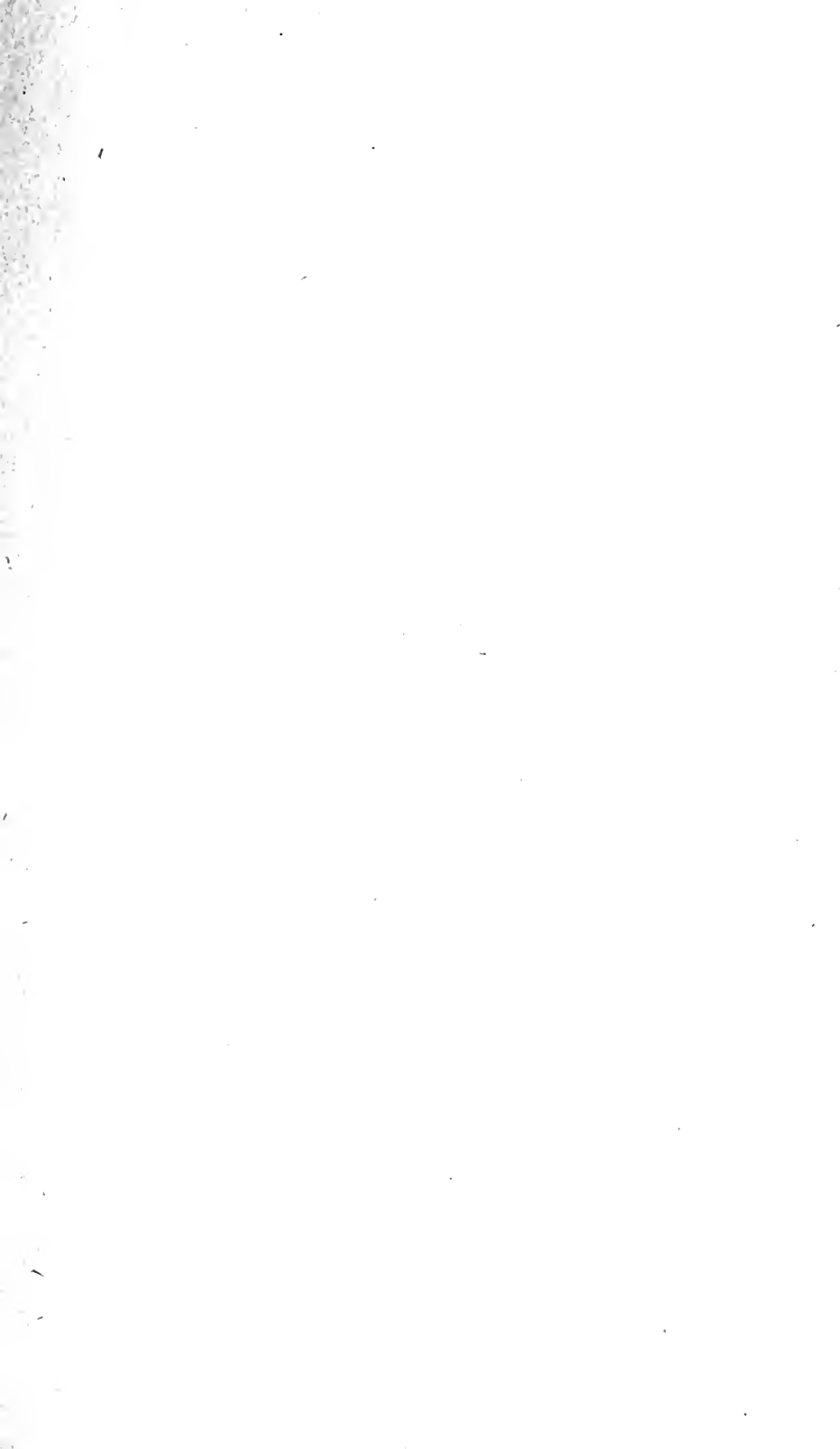
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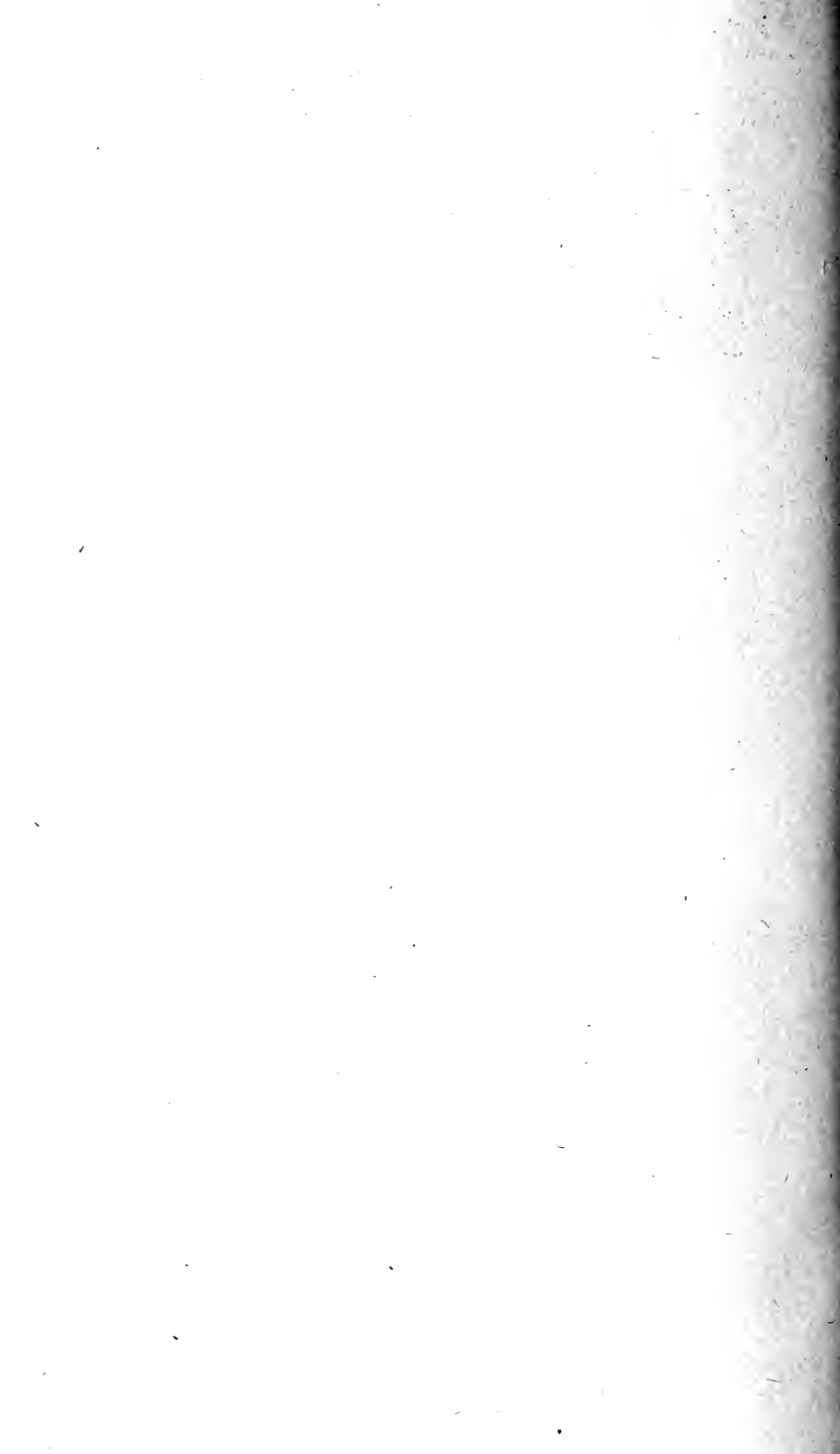
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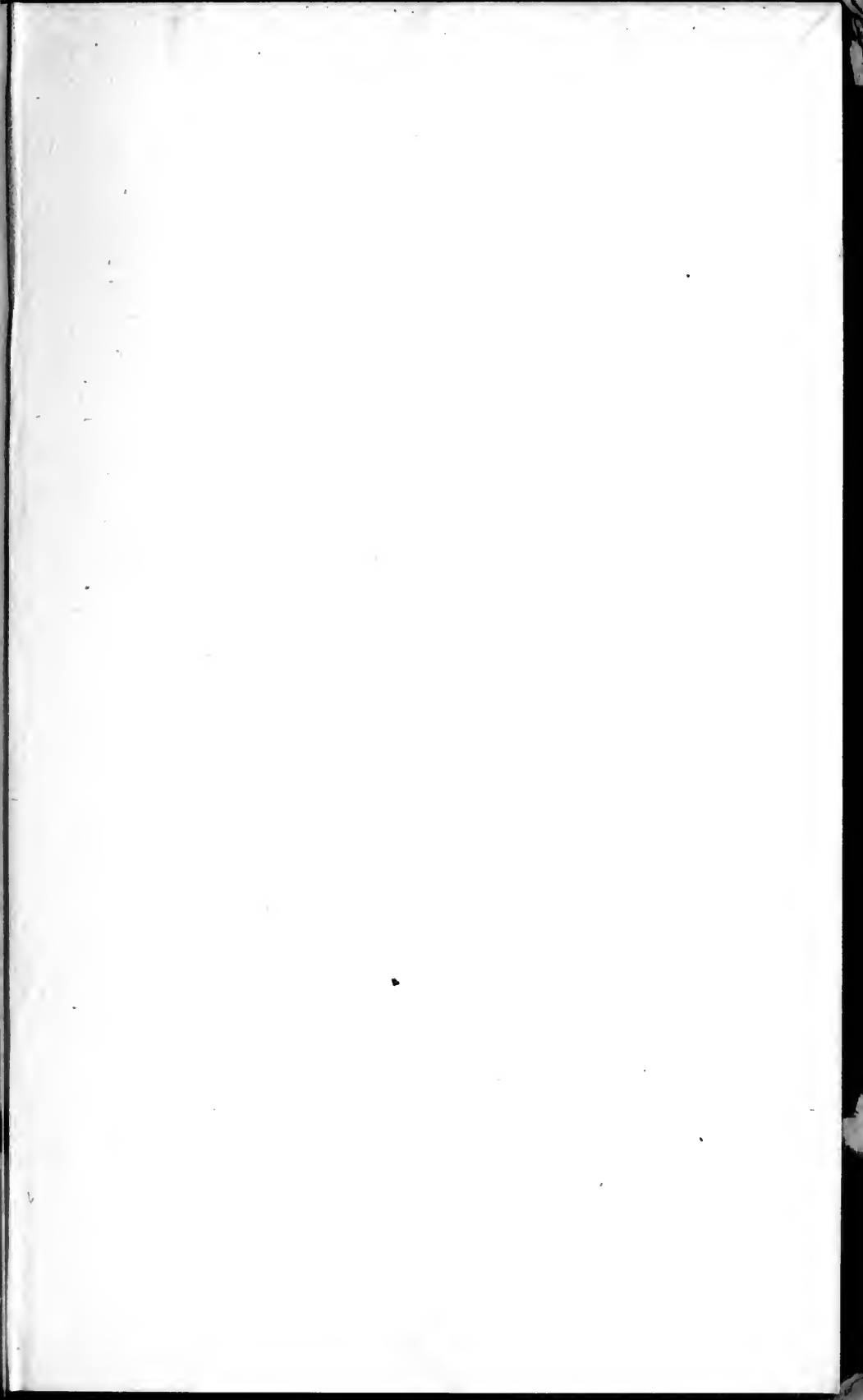
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